Supreme Court, U.S.
FILED

94 173 JUL 26 1994

OFFICE OF THE CLERK

No. 94-

In The

Supreme Court of the United States

October Term, 1994

CARL DIXON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

LAWRENCE C. MARSHALL
Counsel of Record
357 East Chicago Ave.
Chicago, Illinois 60611
(312) 503-7412

JEFFREY URDANGEN
343 S. Dearborn St., Ste. 1510
Chicago, Illinois 60604
(312) 939-0330

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

480

QUESTION PRESENTED FOR REVIEW

Whether a witness who repeatedly and successfully invokes his Fifth Amendment right and refuses to testify about an out-of-court statement when questioned by the prosecution on direct examination is "available" for cross-examination by the defendant about that out-of-court statement, as required by the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF FACTS 2

A. The Testimony of Christopher Carlisle 2

B. Introduction of Carlisle's Out-Of-Court Statement 5

C. The Trial Court's Verdict 7

D. The Appeals 8

REASONS FOR GRANTING THE WRIT 8

I. A WITNESS WHO HAS REPEATEDLY AND SUCCESSFULLY INVOKED HIS FIFTH AMENDMENT RIGHT TO REFUSE TO TESTIFY ON DIRECT EXAMINATION IS "UNAVAILABLE" FOR CONFRONTATION EVEN IF THE DEFENDANT DOES NOT GO THROUGH THE FUTILE AND ETHICALLY DUBIOUS FORMALITY OF FORCING THE WITNESS TO CONTINUOUSLY REPEAT HIS ASSERTION OF THE PRIVILEGE ON CROSS-EXAMINATION 10

TABLE OF CONTENTS – Continued

Page

A. The Introduction Of An Out-Of-Court Statement About Which The Declarant Is Unavailable To Testify Is A Paradigmatic Violation Of A Defendant's Right To Confront The Witnesses Against Him 11

B. A Defendant Need Not Perform The Futile Act Of Trying To Cross-Examine A Witness Who Already Has Unequivocally And Successfully Invoked His Privilege To Refuse To Testify 13

C. Requiring The Defendant To Call A Witness To The Stand When It Is Obvious That The Witness Will Invoke The Privilege Against Self-Incrimination Violates Settled Rules Of Procedure And Ethics Governing The Conduct Of Trials 20

D. The Witness In This Case Unequivocally Asserted His Fifth Amendment Right And Refused To Testify On The Material Issues Surrounding The Out-Of-Court Statement That Was Admitted 22

CONCLUSION 25

APPENDIX

Opinion of The Appellate Court Of Illinois...App. 1

Order of the Supreme Court Of Illinois, denying Leave to Appeal.....App. 13

Order of Associate Justice John Paul Stevens, extending the time for filing a Petition for a Writ of Certiorari.....App. 14

Order of the Appellate Court Of Illinois, denying Petition for Rehearing .....App. 15

TABLE OF AUTHORITIES

Page

CASES

Bruton v. *United States*, 391 U.S. 123 (1968) 16

California v. *Green*, 399 U.S. 149 (1970) 10, 13

Davis v. *Alaska*, 415 U.S. 308 (1974) 11

Delaware v. *Fensterer*, 474 U.S. 15 (1985) 22

Douglas v. *Alabama*, 380 U.S. 415 (1965) ..... *passim*

Fountain v. *United States*, 384 F.2d 624 (5th Cir. 1967), cert. denied, 390 U.S. 1005 (1968) 24

Lee v. *Illinois*, 476 U.S. 530 (1986) 12, 13, 15, 16

Mattox v. *United States*, 156 U.S. 237 (1895) 10

Mayes v. *Sowders*, 621 F.2d 850 (6th Cir.), cert. denied, 449 U.S. 922 (1980) 13, 24

Michigan v. *Dyer*, 425 Mich. 572, 390 N.W.2d 645 (Mich. 1986) 20

Nelson v. *O'Neil*, 402 U.S. 622 (1971) 22

Ohio v. *Roberts*, 448 U.S. 56 (1980) 12, 16

People v. *Nally*, 134 Ill. App. 3d 865, 480 N.E.2d 1373 (Ill. App. Ct. 1985) 20

People v. *Rosenthal*, 670 P.2d 1254 (Colo. App. 1983) 18

Pointer v. *Texas*, 380 U.S. 400 (1965) 11

Rice v. *Marshall*, 709 F.2d 1100 (6th Cir. 1983), cert. denied, 465 U.S. 1034 (1984) 12

TABLE OF AUTHORITIES

Page

Robinson v. *State*, 102 Wis. 2d 343, 306 N.W.2d 668 (Wis. 1981) 12

State v. *Hansen*, 312 N.W.2d 96 (Minn. 1981)..... 17

State v. *Smith*, 415 A.2d 553 (Me. 1980)..... 18

Thomas v. *Cuyler*, 548 F.2d 460 (3rd Cir. 1977) 12

United States v. *Adams*, 759 F.2d 1099 (3d Cir.), cert. denied, 474 U.S. 971 (1985) 17

United States v. *Berrio-Lodono*, 946 F.2d 158 (1st Cir. 1991), cert. denied, 112 S.Ct. 1223 (1992)..... 24

United States v. *Brainard*, 690 F.2d 1117 (4th Cir. 1982)..... 18

United States v. *Cardillo*, 316 F.2d 606 (2nd Cir.), cert. denied, 375 U.S. 822 (1963) 24

United States v. *Doddington*, 822 F.2d 818 (8th Cir. 1987)..... 20

United States v. *Flores*, 985 F.2d 770 (5th Cir. 1993) 12, 17

United States v. *Harrell*, 788 F.2d 1524 (11th Cir. 1986)..... 17

United States v. *LaRiche*, 549 F.2d 1088 (6th Cir.), cert. denied, 430 U.S. 987 (1977) 25

United States v. *Lyons*, 703 F.2d 815 (5th Cir. 1983) 20

TABLE OF AUTHORITIES

Page

United States v. *Martin*, 526 F.2d 485 (10th Cir. 1975) 20

United States v. *Oropeza*, 564 F.2d 316 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978) 18

United States v. *Owens*, 484 U.S. 554 (1988) 22

United States v. *Pelton*, 578 F.2d 701 (8th Cir.), cert. denied, 439 U.S. 964 (1978) 18

United States v. *Salerno*, 868 F.2d 524 (2nd Cir.), cert. denied, 493 U.S. 811 (1989) 18

United States v. *Seifert*, 648 F.2d 557 (9th Cir. 1980) 24

United States v. *Swanson*, 9 F.3d 1354 (8th Cir. 1993) 20

United States v. *Thomas*, 571 F.2d 285 (5th Cir. 1978) 18

STATUTES & RULES

725 ILCS 5/115-10.1 5

Federal Rule of Evidence 804 14

OTHER AUTHORITIES

American Bar Association's Standards Relating To The Administration Of Criminal Justice, Defense Function Standard 4-7.6 21

American Bar Association's Standards Relating To The Administration Of Criminal Justice, Prosecution Function Standard 3-5.7 21

II A. Amsterdam, *Trial Manual For The Defense Of Criminal Cases* §§ 378-384 (1984) 24

5 J. Wigmore, *Evidence* § 1395 (3d ed. 1940) 12

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, Fourth Division, affirming Carl Dixon's conviction, is reproduced at App. 1-11.

STATEMENT OF JURISDICTION

Carl Dixon was convicted of murder on October 31, 1991. The Appellate Court of Illinois, First District, Fourth Division, affirmed the conviction on November 18, 1993 (App. 1-11), and denied Dixon's Petition for Rehearing on December 16, 1993. App. 14. The Illinois Supreme Court denied Leave to Appeal on April 6, 1994. App. 12. On June 26, 1994, Justice Stevens granted petitioner's motion to extend the time for filing a Petition for a Writ of Certiorari to July 26, 1994. App. 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * * ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT OF FACTS

Carl Dixon was convicted of murder based on what the trial court acknowledged to be very questionable evidence: an out-of-court statement made by one Christopher Carlisle. Carlisle had been brought in for police questioning after police arrived at the murder scene and found Carlisle standing next to the body of the victim, Patrick Marshall. Tr. A18-20. After a full day of questioning, Carlisle allegedly made a statement implicating Dixon. Tr. B16. At trial, however, Carlisle refused to answer any questions about this statement, invoking his Fifth Amendment privilege against self-incrimination. Tr. A61-64. Nonetheless, the trial court admitted the out-of-court statement over the objection of the defense. Tr. B10. The trial court recognized the significant legal issues involved in this case, though, and allowed Dixon to remain free on bond pending appeal. The court explained that the propriety of predicating a conviction on this sort of out-of-court statement "ought to be specifically addressed by" higher courts. Tr. B35.

A. The Testimony of Christopher Carlisle

On direct examination by the prosecution, Christopher Carlisle testified that he was with Patrick Marshall on the morning of May 12, 1990, when Marshall was shot and killed. Carlisle stated that he was standing with Marshall on the sidewalk when a green car pulled up to

the curb, someone jumped out of the car, and that person shot Marshall. Tr. A58. Carlisle testified that it was dark at the time of the incident and that he did not see the person who shot Marshall. He testified also that he did not know who owned the car. Tr. A58-59. This testimony – that Carlisle could not identify the killer – was entirely consistent with the information Carlisle gave the police when they arrived at the scene of the murder. See A25.

Carlisle's testimony offered no support to the prosecution's case against Carl Dixon. The prosecution proceeded, therefore, to ask Carlisle questions, using information derived from the alleged out-of-court statement Carlisle had given to Assistant State's Attorney David Studenroth the night after the murder of Patrick Marshall.

Q: Did you see Carl Dixon get out of the car?

A: No, I didn't.

Q: Did you see Carl Dixon walk up to Patrick?

A: No, sir.

Q: Did you see Carl Dixon with a gun in his hand?

A: No, sir.

Q: Did you hear Carl Dixon say, "Where is my shit at?"

A: No, sir.

Q: Did you hear Patrick respond, "I will get it to you, man."?

A: No, sir.

Q: Did you see Carl Dixon point that gun at Patrick and start firing several times at Patrick?

A: No, sir.

Q: Did you see Patrick run about a half block and collapse?

A: No, sir. (Tr. A60-61)

Following this testimony, the prosecution showed Carlisle the out-of-court statement he was alleged to have made to Assistant State's Attorney Studenroth. Tr. A61. Carlisle refused to answer any questions about the statement or its substance. In response to every question about the statement, Carlisle invoked his Fifth Amendment right against self-incrimination. And each and every time that Carlisle invoked this right, the trial court sustained Carlisle's claim that he need not answer any questions about the out-of-court statement that was being attributed to him:

Q: Is this the statement that you signed for the assistant state's attorney?

A: I plead the Fifth.

THE COURT: Sustained.

Q: Is that your signature on the bottom of the page?

A: I plead.

THE COURT: Sustained.

* * *

Q: "What did you tell the state's attorney?".

A: I plead the fifth.

THE COURT: Sustained (Tr. A61-64)

The only matter about which Carlisle was willing to testify with regard to his statement was the fact that he

was questioned by "a state's attorney" in the lobby of a police station about what he had seen on May 12, 1990. Tr. A62-63. Because Carlisle was successfully asserting his Fifth Amendment privilege in response to all questions about his May 12 statement (and because at that stage all of Carlisle's evidence was favorable to the defense), the defense asked no questions of Carlisle on cross-examination. Tr. A66.

B. Introduction of Carlisle's Out-Of-Court Statement

At this point in the case the prosecution was still without any evidence that could come close to supporting its charge against Carl Dixon. With its next witness, however, the prosecution sought to remedy this with the introduction of evidence relating to the substance of the out-of-court statement that Carlisle had allegedly made on May 12. The prosecution called Assistant State's Attorney David Studenroth to the stand and elicited testimony from him about the statement that he had taken from Christopher Carlisle at approximately 10:00 p.m. on May 12, 1990. Tr. B2-6. Over strenuous defense objections, Studenroth was allowed to testify about the contents of Carlisle's out-of-court statement. The following testimony about Carlisle's out-of-court statement[1] constituted the sole evidence upon which the court relied in convicting Dixon:

> Q: Mr. Studenroth, in that statement does Chris Carlisle state that he observed Carl Dixon get out of the car on May 12, 1990, 8125 South Manistee?

---

[1] The State argued that the evidence was admissible as substantive evidence of guilt – not simply impeachment of Carlisle – under the terms of 725 ILCS 5/115-10.1. Tr. B6-B11.

A: Yes, it does.

Q: And that statement does it say Carl Dixon then walked toward – he – Chris Carlisle saying in that statement that he saw Carl Dixon walk toward Mr. Marshall?

A: Yes, he did.

Q: And that statement Chris Carlisle says to you that he saw Carl Dixon with a gun in his hand?

A: Yes, it does.

Q: In that statement does Chris Carlisle say that Carl Dixon at this time asked Patrick Marshall where's my shit at?

A: Yes.

Q: And in that statement does Carlisle say Patrick Marshall replied I'll get it to you man?

A: Yes.

Q: In that statement does Chris Carlisle say that he then observed Carl Dixon point the gun at Patrick Marshall and fire several times?

A: Yes, it does.

Q: And in that statement does Chris Carlisle say that he and Patrick Marshall then began running?

A: Yes, it does.

Q: And in that statement does it say that Chris – does Chris Carlisle say in that statement that I observed Patrick Marshall collapse after running about half a block?

A: Yes, it does. (Tr. B11-12)

The defense rested without recalling Carlisle to the stand for cross-examination. Because Carlisle had repeatedly and successfully invoked the Fifth Amendment to all questions relating to the statement, defense counsel recognized the futility and impropriety of recalling Carlisle to the stand when it was clear that he would successfully invoke the Fifth Amendment. As defense counsel explained to the court: "it was already stated by this Court that he was invoking, correctly so, his privilege against self-incrimination." Tr. C23.

C. The Trial Court's Verdict

In announcing its verdict, the trial court acknowledged that:

> absent Carlisle's impeachment there is no evidence connecting * * * Defendant with the acts which led to the death of Mr. Patrick [sic]. There is no direct evidence. There is circumstantial evidence. But that circumstantial evidence * * * just goes to the pointing of the existence [of a] motive, and the fact that Mr. Dixon was looking for the deceased after the events in that school yard. Tr. B33.

Nonetheless, relying solely on Carlisle's out-of-court statement – a statement about which the defense had no opportunity to cross-examine Carlisle – the trial court found Dixon guilty of first degree murder. Tr. B35. The court later denied Dixon's motion for a new trial and sentenced Carl Dixon to twenty years imprisonment. Tr. C3-26; D3-5. The trial court was, however, extremely

concerned about the legal questions associated with the admission of evidence about Carlisle's statements. Hence, the trial court allowed Dixon to remain free on bond pending appeal so that higher courts could consider the issues. Tr. B35.

D. The Appeals

The Appellate Court of Illinois, First Judicial District, Fourth Division, rejected Dixon's claim that the introduction of evidence about Carlisle's out-of-court statement violated Dixon's Sixth Amendment right of confrontation. See App. 10; Brief and Argument of Defendant-Appellant at 30-39. The Appellate Court ruled that Dixon's claim that he was unable to confront Carlisle about the out-of-court statement amounted to "speculation" because the defendant did not go through the formality of actually calling Carlisle to the stand after Carlisle had already asserted his Fifth Amendment right and refused to answer any and all questions relating to the out-of-court statement. App. 8. Even though Carlisle had repeatedly refused to testify about the statement on direct examination, the court held that Dixon could not "claim a lack of opportunity to cross-examine Carlisle when he did not even attempt to call Carlisle to the stand." App. 8. See also App. 10. The Illinois Supreme Court denied Dixon's Petition for Leave to Appeal. App. 12.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case adopted an unreasonable rule for assessing whether an out-of-court declarant is "available" for cross-examination at trial. Contrary

to many of this Court's statements and the great majority of lower federal and state court holdings, the Illinois court ruled that a witness cannot be treated as "unavailable" based on his assertion of a Fifth Amendment privilege on direct examination unless the defendant calls the witness to the stand and forces the witness to invoke his Fifth Amendment privilege once again in response to cross-examination. The rule that the Illinois court announced in this case applies no matter how many times the witness has already been allowed to assert the privilege in the course of the proceeding and no matter how obvious it is that the witness will continue to assert the privilege.

The rule that the Illinois court adopted suffers from a number of infirmities. First, it artificially interferes with a defendant's Confrontation Clause rights by requiring the defendant to go through the wholly futile act of putting a witness on the stand when it is clear to all that the witness will continue to successfully invoke the Fifth Amendment and will refuse to testify. Worse yet, this rule places defense counsel in an appalling Catch-22. On the one hand, if defense counsel calls the witness to the stand – knowing full well that the witness has already invoked the privilege and will continue to invoke the privilege – then defense counsel has violated an established rule of trial procedure that prohibits counsel from calling a witness to the stand when it is known that the witness will properly refuse to testify. On the other hand, if defense counsel does not call the witness to the stand – thereby complying with the rule just mentioned – the court will assume that the witness was available for

cross-examination (and the violation of the defendant's right to confront witnesses will be ignored). It is essential that this Court grant this Petition for a Writ of Certiorari to rectify the glaring violation of Carl Dixon's right to confront witnesses, and to provide some much needed guidance to the lower courts, which continue to grapple with the standard for assessing when a witness is "available" for confrontation.

I. A WITNESS WHO HAS REPEATEDLY AND SUCCESSFULLY INVOKED HIS FIFTH AMENDMENT RIGHT TO REFUSE TO TESTIFY ON DIRECT EXAMINATION IS "UNAVAILABLE" FOR CONFRONTATION EVEN IF THE DEFENDANT DOES NOT GO THROUGH THE FUTILE AND ETHICALLY DUBIOUS FORMALITY OF FORCING THE WITNESS TO CONTINUOUSLY REPEAT HIS ASSERTION OF THE PRIVILEGE ON CROSS-EXAMINATION.

Nearly a century ago, this Court recognized that the "primary object" of the Confrontation Clause is to "prevent depositions or ex parte affidavits * * * being used against the prisoner in lieu of a personal examination and cross-examination of the witness." *Mattox* v. *United States*, 156 U.S. 237, 242 (1895); see also *California* v. *Green*, 399 U.S. 149, 156 (1970) (the "particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions"). Indeed, the Court has recognized that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the

right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965).

A. The Introduction Of An Out-Of-Court Statement About Which The Declarant Is Unavailable To Testify Is A Paradigmatic Violation Of A Defendant's Right To Confront The Witnesses Against Him.

In *Douglas* v. *Alabama*, 380 U.S. 415 (1965), this Court established the bedrock principle that a witness who invokes his or her Fifth Amendment right against self-incrimination is unavailable for cross-examination for purposes of the Sixth Amendment. In *Douglas*, a case much like this case, the prosecution called a witness named Loyd who repeatedly invoked his right against self-incrimination and refused to answer questions about his out-of-court confession which had implicated Douglas. (Loyd had already been tried for the crime). The prosecutor proceeded to read from the confession, pausing after every few sentences to ask the witness, "Did you make that statement." *Douglas*, 380 U.S. at 416. This Court was unanimous in condemning this practice: "petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.* at 419.

The principle of *Douglas*, as this Court explained in *Davis* v. *Alaska*, 415 U.S. 308 (1974), is based on the realization that the constitutional right to confront witnesses requires more than the mere opportunity to have the witness physically present on the stand:

> The opponent demands confrontation, *not for the idle purpose of gazing upon the witness, or of being gazed upon by him,* but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

Id. at 316 (emphasis in original) (citing 5 J. Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940)). This Court and lower courts have consistently held that a defendant's inability to cross-examine a witness who invokes the Fifth Amendment "plainly denie[s] him" the Constitutional right to confront witnesses against him. *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986) (quoting *Douglas*, 380 U.S. at 419).[2]

It is clear, then, that the introduction of Christopher Carlisle's out-of-court statement constituted a dramatic violation of Carl Dixon's right of confrontation.[3] As in

---

[2] See generally *United States* v. *Flores*, 985 F.2d 770, 778 (5th Cir. 1993) ("the unavailability principle has been expanded to include a witness who, by the exercise of privilege, refused to testify") (citation omitted); *Rice v. Marshall*, 709 F.2d 1100, 1102 (6th Cir. 1983) ("it is clear that a witness is not 'available' for cross-examination when that witness refuses to testify"); *Thomas* v. *Cuyler*, 548 F.2d 460, 463 (3rd Cir. 1977) ("a witness who refuses to be sworn or to testify at all or one who, having been sworn, declines to testify on Fifth Amendment grounds, has not been thus made available for cross-examination"); *Robinson v. State*, 102 Wis. 2d 343, 349, 306 N.W.2d 668, 671 (Wis. 1981) ("Where a witness avails himself of his fifth amendment rights, confrontation is denied").

[3] This is not a case in which other "indicia of reliability" overcome the constitutional prohibition on admitting evidence about which the defendant has no opportunity to engage in cross-examination. See *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Neither the prosecution nor any of the lower courts have ever

Douglas, an out-of-court statement was used to convict a defendant even though the defendant had no opportunity to examine the declarant about the statement. The only way that the Illinois court could affirm Dixon's conviction was to apply a grudging standard for assessing Confrontation Clause claims and thereby hold that Carlisle's unavailability for cross-examination was somehow speculative. As will be seen, however, there was nothing at all speculative about Carlisle's unavailability, and the rule that the Illinois court applied cannot survive scrutiny.

B. A Defendant Need Not Perform The Futile Act Of Trying To Cross-Examine A Witness Who Already Has Unequivocally And Successfully Invoked His Privilege To Refuse To Testify.

The overwhelming majority of courts have recognized that assessing a witness's availability for confrontation is a functional – not a formalistic – inquiry. When it is

---

advanced that claim in this case, and there is no evidence to support any contention that Christopher Carlisle's self-serving statement to police, while Carlisle himself was being questioned as a suspect, contained any special indicia of reliability. See generally *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986) ("when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination"); *Mayes* v. *Sowders*, 621 F.2d 850, 856 (6th Cir. 1980) (self-serving statement by suspect under questioning lacks any special, inherent reliability). Nor is this a case in which any prior opportunity to cross-examine the declarant satisfied Dixon's rights under the Confrontation Clause. See *California* v. *Green*, 399 U.S. 149 (1970).

obvious that the witness will invoke his Fifth Amendment right and refuse to testify, courts have had no difficulty in declaring the witness unavailable and have not required that the witness be physically called to the stand and forced to invoke or re-invoke the privilege. Many of these cases have involved "unavailability" under the Confrontation Clause; others have involved "unavailability" with regard to rules of evidence similar to Federal Rule of Evidence 804.[4] In both contexts, however, the great majority of courts, including this Court, have consistently eschewed any requirement that the witness be forced to formally invoke, much less re-invoke, the Fifth Amendment as a condition of showing unavailability.

This Court's approach to this question has not yet been the subject of a square holding (which is the reason, of course, that granting this Petition for a Writ of Certiorari is appropriate). A number of this Court's decisions reveal, though, that this Court has never required anything close to a formal assertion, much less re-assertion, of the Fifth Amendment as a condition of finding a witness unavailable.

---

[4] Rule 804(b) provides that certain types of out-of-court statements "are not excluded by the hearsay rule if the declarant is unavailable as a witness." It should be noted that cases adopting a functional inquiry in applying Rule 804, which requires that the witness "be exempted by ruling of the court on the ground of privilege," are especially persuasive authorities with regard to the Confrontation Clause, which contains no such precise requirement that "unavailability" be based on the witness's having been exempted from testifying by a "ruling of the court."

For example, in *Douglas*, the witness, Loyd, had been called to the stand by the prosecution and had repeatedly asserted his Fifth Amendment right on direct examination when asked about his out-of-court statement. The defendant, Douglas, made no effort to call Loyd to the stand to pursue cross-examination about the statement. See *Douglas* v. *Alabama*, Record at 131-132. Yet, this Court held, without apparent reservation, that Loyd was unavailable for cross-examination and that the references to his out-of-court statements violated Douglas's rights under the Confrontation Clause. (Of course, under the approach applied by the Illinois court in this case, Loyd's unavailability on cross-examination would have been deemed "speculative" because Douglas never formally called Loyd to the stand and never forced him to re-invoke on cross-examination the privilege that he had already invoked repeatedly on direct examination.)

Similarly, in *Lee* v. *Illinois*, the prosecution introduced the out-of-court statement of defendant Thomas as evidence against defendant Lee. In support of its finding that defendant Lee was not able "to confront and cross-examine" Thomas, this Court observed simply that "neither defendant testified at trial." *Lee*, 476 U.S. at 536. The Court most certainly did not require Lee to call Thomas to the stand in order to demonstrate what was already obvious – that Thomas had chosen to invoke his Fifth Amendment right.

The dissent in *Lee* was even more explicit on this point. The four dissenters in *Lee* agreed that Thomas was " 'unavailable' as a witness." *Id.* at 549 (Blackmun, J., with whom Burger, C.J., and Powell & Rehnquist, JJ.,

joined, dissenting).[5] In support of this conclusion, the dissenters explained that "[a]lthough physically present in the courtroom, [Thomas] *clearly would have* invoked his privilege against self-incrimination if called to the stand." *Id.* at 549 (emphasis added). The dissenters explained further that "[b]ecause the State did not call Thomas to testify, he did not expressly invoke his Fifth Amendment privilege. In the circumstances of this case, however, *the absence of this formality is not decisive*," in large part because "such an effort" would "have been futile." *Id.* at 549 n.3. (emphasis added) This analysis is a far cry from the demand for elaborate formality that the Illinois court imposed here.

One further example of this Court's functional approach can be gleaned from the Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968). In holding that the introduction of the out-of-court statement of defendant Evans violated the Confrontation Clause rights of defendant Bruton, the Court observed that the statement was introduced "in a form not subject to cross-examination, since Evans did not take the stand." *Id.* at 128. Here, again, the Court did not demand that Bruton go through the futile act of actually calling Evans to the stand in order to show that Evans would refuse to testify. As this Court stated in *Ohio* v. *Roberts*, 448 U.S 56, 74 (1980): "The law does not require the doing of a futile act."

This Court's decisions in *Douglas*, *Lee*, and *Bruton* reveal how far removed the Illinois court's approach is

---

[5] The dissent in *Lee* argued that the evidence was, nonetheless, sufficiently reliable to be admitted. 476 U.S. at 551-557. That theory of admissibility has no relevance to Carlisle's statement. See *supra*, note 3.

from the approach that this Court has consistently followed. A review of the decisions of various federal courts of appeals and state courts similarly reveals that the Illinois court's approach is out of step with the majority position.

For example, in *United States* v. *Adams*, 759 F.2d 1099 (3d Cir. 1985), a potential witness's counsel made clear that the witness would invoke the privilege and refuse to testify if called to the stand. The court held that the witness was clearly unavailable and explained that "the confrontation clause does not require the futile act of calling [a witness] to the stand in open court to testify only to have him refuse." *Id.* at 1107. Similarly, in *State* v. *Hansen*, 312 N.W.2d 96 (Minn. 1981), two witnesses who had given out-of-court statements refused to testify about the statement when called on direct examination. In holding that admission of the out-of-court statements violated the defendant's Confrontation Clause rights, the Minnesota Supreme Court recognized that the defendant did not try to call the witnesses to the stand for cross-examination. Nonetheless, the court held that the witnesses were clearly unavailable for cross-examination because any "attempt at cross-examination would have been futile." *Id.* at 103 n.5.

Many other courts have used this same approach and have conducted a practical inquiry into whether the witness was available. See, *e.g.*, *United States* v. *Flores*, 985 F.2d 770, 774 n.9 (5th Cir. 1993) (witness was unavailable for cross-examination even though "he did not personally utter the magic words or take the stand"); *United States* v. *Harrell*, 788 F.2d 1524, 1526 (11th Cir. 1986) (witnesses were unavailable in case in which they were defendants

and "were privileged against testifying"); *United States* v. *Brainard*, 690 F.2d 1117, 1123 (4th Cir. 1982) (declining "to require the defense actually to produce [the witness] and obtain a formal ruling on his assertion of the privilege" when doing so would constitute "mere formalism"); *United States* v. *Thomas*, 571 F.2d 285, 288 (5th Cir. 1978) (rejecting "mere formalism" of requiring co-defendant to assert privilege in court when it was "patent" that the co-defendant would successfully assert the privilege); *State* v. *Smith*, 415 A.2d 553, 559 (1980) (unavailability was shown where the witness "stated that she would invoke her Fifth Amendment privilege against self-incrimination if called to testify at defendant's trial").

On the other hand, a number of courts have applied a standard much closer to the standard that the Illinois court applied in this case. For example, in *United States* v. *Pelton*, 578 F.2d 701 (8th Cir. 1978), the court held that the witness could not be deemed unavailable because the witness had not stated "firsthand and in the court's presence that she did intend to refuse to testify in reliance on her fifth amendment privilege." *Id.* at 709. Similarly, in *United States* v. *Salerno*, 868 F.2d 524, 542 n.8 (2nd Cir. 1989), the court adopted the *Pelton* approach and ruled that a formal assertion of privilege is necessary to show unavailability. See generally *United States* v. *Oropeza*, 564 F.2d 316, 325 n.8 (9th Cir. 1977) ("express claim of privilege and a ruling thereon should be made"); *People* v. *Rosenthal*, 670 P.2d 1254, 1256 (Colo. Ct. App. 1983) ("declarant must actually invoke the privilege before the trial court, and the trial court must rule that the privilege is available").

The conflict among lower courts that we have described is a real one, and a decision by this Court would provide much needed guidance in this area. It must be noted, however, that no court – even those requiring a more formal in-court assertion of the Fifth Amendment as a condition of declaring a witness unavailable – has ever gone so far down the road of requiring futile formalism as the Illinois court did in this case.

Here, Christopher Carlisle *did* take the stand, and Carlisle *did* invoke his privilege in response to every question about his out-of-court statement, and the trial court *did* hold that Carlisle was properly invoking the privilege. See *supra* 4-5. It is simply irrational to require a defendant, after all that, to call the witness to the stand once again and to ask those same questions all over again. The Illinois court created an unreasonable and unprecedented rule in order to avoid the result that the Constitution so obviously compels here: Carl Dixon's Sixth Amendment rights were violated by the admission of an unreliable out-of-court statement that he had no opportunity to confront. Mr. Dixon asks this Court to use this opportunity to right this wrong, while at the same time providing the lower courts with guidance on these recurring legal issues.

C. Requiring The Defendant To Call A Witness To The Stand When It Is Obvious That The Witness Will Invoke The Privilege Against Self-Incrimination Violates Settled Rules Of Procedure And Ethics Governing The Conduct Of Trials.

As we have explained, the rule that the Illinois court imposed here senselessly requires a defendant to undertake the futile act of recalling a witness to the stand, even though it is beyond question that the witness will continue to refuse to testify. Worse than being senseless, though, the rule is also offensive to fundamental principles of trial procedure and trial ethics.

Established principles of trial procedure provide that a "defendant does not have the right to call a witness to the stand simply to force invocation of the right against self-incrimination." *United States* v. *Swanson*, 9 F.3d 1354, 1359 (8th Cir. 1993) (quoting *United States* v. *Doddington*, 822 F.2d 818, 822 (8th Cir. 1987)). See generally *United States* v. *Lyons*, 703 F.2d 815, 818 (5th Cir. 1983) ("if the judge sustains a witness' assertion of the privilege, the defendant has no right to call the witness to the stand") (citing cases); *United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975) (judge properly refused to allow counsel to call witness to the stand when "all concerned knew full well that the informant intended to invoke his Fifth Amendment right not to testify. He had already done so successfully at the first trial"); *People* v. *Nally*, 134 Ill. App. 3d 865, 869-870, 480 N.E.2d 1373, 1378 (Ill. App. Ct. 1985) ("it is improper for a party to call a witness whom he has reason to believe will invoke this privilege"); *Michigan* v. *Dyer*, 425 Mich. 572, 576, 390 N.W.2d 645, 647

(Mich. 1986) ("the rule of law remains the same: a lawyer may not knowingly * * * call a witness knowing that he will claim a valid privilege not to testify").

This rule has a significant ethical component as well. The American Bar Association's Standards Relating To The Administration Of Criminal Justice provide that "defense counsel shall not call a witness in the presence of the jury who the lawyer knows will claim a valid privilege not to testify." Defense Function Standard 4-7.6; see also Prosecution Function Standard 3-5.7.[6]

When these legal principles and ethical mandates are combined with the rule that the Illinois court imposed in this case, the defense is placed in an unworkable Catch-22. On the one hand, it is improper to call a witness who will clearly invoke his Fifth Amendment right (a witness like Christopher Carlisle who had already taken the Fifth successfully on direct examination). On the other hand, the Illinois court has now held that complying with the rules of ethics and trial procedure (and declining to call such a witness) forecloses a defendant's opportunity to show that a witness was "unavailable" for cross-examination. Some guidance from this Court is badly needed.

---

[6] Carl Dixon was tried in a bench trial, but the Confrontation Clause surely does not incorporate a different definition of unavailability for bench and jury trials.

D. The Witness In This Case Unequivocally Asserted His Fifth Amendment Right And Refused To Testify On The Material Issues Surrounding The Out-Of-Court Statements That Were Admitted.

The fact that Christopher Carlisle was willing to testify about matters not related to his out-of-court statement did not, in any sense, satisfy Carl Dixon's right to confront Carlisle about the out-of-court statement that was used to convict Dixon. Carlisle's out-of-court statement could not constitutionally be admitted as substantive evidence against Dixon unless Dixon was provided an "opportunity for effective cross-examination" on the full range of issues related to the out-of-court statement. See *United States* v. *Owens*, 484 U.S. 554, 559 (1988). The restrictions imposed on cross-examination by virtue of Carlisle's invoking the Fifth Amendment on issues relating to the most potentially incriminating evidence in the prosecution's case served to "effectively * * * emasculate the right of cross-examination itself." *Delaware* v. *Fensterer*, 474 U.S. 15, 19 (1985).

As the trial court noted, Carlisle's out-of-court statement constituted the only evidence that, if believed, truly incriminated Carl Dixon. Tr. B33. *Cf. Douglas*, 380 U.S. at 419 (the unavailable witness's "alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so"). Yet, Carlisle refused to be examined on any matters related to the statement.[7]

---

[7] This is not a case like *United States* v. *Owens*, 484 U.S. 554 (1988), or *Nelson* v. *O'Neil*, 402 U.S. 622 (1971), in which a witness did testify, but testified in a manner that frustrated the

Invoking his Fifth Amendment right not to admit that he lied to the authorities when he implicated Dixon on May 12, Carlisle repeatedly: (a) refused to answer any questions relating to whether he actually made the statement; (b) refused to answer any questions relating to whether he signed the statement; (c) refused to answer any questions about things he said or did not say to the State's Attorney.

The devastating effect that Carlisle's invocation of his right against self-incrimination[8] had on Dixon's defense cannot be overstated. The only way to defend Carl Dixon was to convince the trier of fact that the statement that Carlisle allegedly made on the night after the murder was false. The only way to defend Carl Dixon was to ask Carlisle about whether he, in fact, made the statement and, if so, what motives he had in making it. For example, constitutionally adequate cross-examination would have included, among other questions, questions about: (a) whether Carlisle made or signed the statement at all;

---

defendant's goals on cross-examination. Those cases raised no Confrontation Clause problems because the witnesses were available, in every sense of the word, to be confronted. Nothing stopped the defendant in those cases from asking any questions they wanted, and the witnesses were compelled to answer all questions. Here, by contrast (as in *Douglas* and *Lee*), the witness was not available, by virtue of a legal barrier as formidable as any physical barrier, to answer the questions that the defendant needed to have answered.

[8] The trial court repeatedly upheld Carlisle's right to assert his privilege. It is, of course, immaterial whether the judge was correct in allowing Carlisle to assert his Fifth Amendment right. See *Douglas*, 380 U.S. at 420.

(b) whether Carlisle made the statement that night because he himself was a suspect in the murder and because he had been told that if he signed the statement he would be allowed to go home that evening; and (c) whether he made the statement because he held some grudge against Carl Dixon. See generally II A. Amsterdam, *Trial Manual For The Defense Of Criminal Cases* §§ 378-384 (1984). Carl Dixon was stripped of his right to confront Carlisle with these critical questions – questions upon which Dixon's freedom turned – when Carlisle refused to answer any and all questions about the May 12 statement.[9]

---

[9] It is obvious that the questions that the defense was precluded from putting to Carlisle went to the heart of the matter at issue here; they were in no sense "collateral" to the damaging evidence about Carlisle's statement that was introduced. Under these circumstances, courts have recognized universally the constitutional impropriety of admitting evidence about which the defendant is precluded from engaging in cross-examination. See generally *United States* v. *Berrio-Lodono*, 946 F.2d 158, 160 (1st Cir. 1991) (Confrontation Clause precludes introduction of testimony if witness refuses to be examined with "respect to a material issue" related to the testimony); *United States* v. *Seifert*, 648 F.2d 557, 561 (9th Cir. 1980) (issue is whether "answers to particular questions would have * * * undermined the government's case") (citation omitted); *Mayes* v. *Sowders*, 621 F.2d 850, 854 (6th Cir. 1980) (although the witness was available for cross-examination on some issues, the witness "could not be considered to be available for the kind of full and effective cross-examination which would allow the prosecution to introduce his out-of-court statements"); *Fountain* v. *United States*, 384 F.2d 624, 628 (5th Cir. 1968) (issue is "whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth" of the evidence); (*United States* v. *Cardillo*, 316 F.2d 606, 611 (2nd Cir. 1963) (distinguishing material limitation on cross-examination from limitations relating to "collateral matters").

The fact that the witness can be cross-examined on *some subjects* is not enough[10]; the issue is whether the witness can be cross-examined on the constitutionally *material subjects*. It is patently unconstitutional to admit evidence against a defendant when the defense is prevented from placing facts before the trier of fact "from which bias, prejudice, or lack of credibility of a prosecution witness may be inferred." *United States* v. *LaRiche*, 549 F.2d 1088, 1096 (6th Cir. 1977). This is precisely what the State of Illinois has done to Carl Dixon.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Alternatively, in the event that the Court believes that the violation of Carl Dixon's right of confrontation is so manifest that this case does not merit plenary consideration, petitioner respectfully asks the Court to summarily reverse the judgment below. It would be most unjust to require Carl Dixon to wait several years in

---

[10] Nor does the fact that the defendant had the opportunity (and took the opportunity) to cross-examine the law enforcement officer who took the statement from Carlisle satisfy the demands of the Confrontation Clause. As this Court stated in *Douglas*, the chance to cross-examine the person who took the statement and inquire about the statement's "genuiness could not substitute for cross-examination of [the out-of-court declarant] to test the truth of the statement itself." 380 U.S. at 420.

prison, pending review on federal habeas corpus, precisely because the errors surrounding his conviction are so obvious. Moreover, various proposed and current limitations on habeas corpus relief make it imperative that this Court use the mechanism of direct review to remedy the egregious constitutional wrong that Carl Dixon has suffered.

Respectfully submitted

LAWRENCE C. MARSHALL
Counsel of Record
357 East Chicago Ave.
Chicago, Illinois 60611
(312) 503-7412

JEFFREY URDANGEN
343 S. Dearborn St., Ste. 1510
Chicago, Illinois 60604
(312) 939-0330

JULY 26, 1994

FOURTH DIVISION
FILED: 11/18/93

No. 1-92-1075

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
v.	)	
CARL DIXON, Defendant-Appellant.	)	HONORABLE EARL E. STRAYHORN, PRESIDING.

JUSTICE JOHNSON delivered the opinion of the court:

After a bench trial in the circuit court of Cook County, defendant, Carl Dixon, was convicted of first degree murder (Ill.Rev.Stat.1987, ch. 38, par. 9-1(a), now 720 ILCS 5/9-1(a) (West 1992)), and sentenced to 20 years of imprisonment in the Illinois Department of Corrections.

On appeal, defendant contends (1) the trial court erroneously admitted the prior inconsistent statement of a State's witness for substantive purposes when the statement did not meet the requirements of section 115-10.1 of the Code of Criminal Procedure (hereinafter the Code) (Ill.Rev.Stat.1989, ch. 38, par. 115-10.1, now 725 ILCS 5/115-10.1 (West 1992)); (2) a witness' assertion of his fifth amendment right against self-incrimination in response to questions pertaining to the prior inconsistent statement denied him his right to confront witnesses

against him; (3) he was not proved guilty beyond a reasonable doubt; and (4) the trial court erroneously denied both his motion for a directed verdict and his motion for a new trial as the evidence was insufficient to prove him guilty beyond a reasonable doubt.

We affirm.

The following pertinent facts were adduced at trial. Officer Darryl Cavin testified that, on the morning of May 12, 1990, he responded to a call regarding a shooting. Upon arriving at the scene, he observed a man lying in the crosswalk of the street with his face down. Officer Cavin stated that he questioned Christopher Carlisle, one of the individuals at the scene. Carlisle told him that the victim's name was Patrick Marshall and that a man ran up behind Patrick and fired three shots.

Ashadu McPherson, the victim's cousin, testified that on the night of May 11, 1990, he was with Patrick Marshall, defendant, Omar Norman, and Christopher Carlisle. McPherson stated that defendant was showing the group of men a black .9 millimeter gun which they passed amongst themselves. As the gun was passed, Marshall ran from the group apparently having taken defendant's gun. Defendant then ran to his house and emerged with a shotgun. He put the shotgun in the trunk of his car and drove around with McPherson and Norman looking for Marshall whom he believed had taken his gun.

As they drove around, defendant told McPherson to get his gun back. McPherson assured defendant that he would get the gun back and then got out of the car. Later that evening, McPherson met up with defendant again

and observed a .22-caliber or a .25-caliber gun in defendant's lap. While they were in the car, defendant said, "Tell Pat to give me my gun" and "If you don't give me my gun, I am going to have to do something to him." McPherson told defendant that he would get his gun back and defendant then dropped off McPherson. McPherson later called home and learned that Marshall had been killed.

At trial, Christopher Carlisle, a friend of both defendant and Patrick Marshall, testified that he was with Marshall on May 12, 1990, but denied many of the facts pertaining to the crime included in a statement he had given to Assistant State's Attorney David Studenroth which directly implicated defendant in the killing. When specifically asked about what he told Studenroth, Carlisle exercised his fifth amendment right against self-incrimination. Carlisle was also shown a copy of the statement and when asked whether the signature at the bottom was his, he again asserted the fifth amendment. Defense counsel chose not to cross-examine Carlisle.

The State then called Assistant State's Attorney Studenroth to the stand who testified that Carlisle gave a three page statement to him regarding Marshall's killing. Subsequent to making the statement, Studenroth observed Carlisle read it and sign each page at the bottom. The statement revealed that Carlisle saw defendant walk toward Marshall with a gun in his hand. Defendant then asked Marshall, "Where's my shit at," and Marshall replied, "I'll get it to you man." The statement further indicated that Carlisle then saw defendant point a gun at Marshall and fire several times. At the conclusion of this testimony, defense counsel chose not to recall Carlisle.

After argument in aggravation and mitigation, defendant was convicted of first degree murder and sentenced to 20 years in the Illinois Department of Corrections. The trial court also sentenced defendant to a 7-year term of imprisonment for violating his probation on a burglary conviction to be served concurrently with the murder sentence. Defendant appeals.

Initially, defendant maintains that the trial court improperly admitted the prior inconsistent statement of Christopher Carlisle as substantive evidence because the statement did not meet the admissibility requirements of section 115-10.1 of the Code. We do not agree.

Section 115-10.1 of the Code provides in pertinent part:

> "Admissibility of prior inconsistent statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement –
>
> (1) was made under oath at a trial, hearing or proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, * * * ." 725 ILCS 5/115-10.1 (West 1992).

For the reasons which follow, Carlisle's statement was properly admitted into evidence.

The first admissibility requirement is that the witness' prior statement must be inconsistent with the testimony he gives at trial. On direct examination, the following colloquy occurred between the prosecutor and Carlisle:

"Q Did you see Carl Dixon get out of the car?

A No, I didn't.

Q Did you see Carl Dixon walk up to Patrick?

A No, sir.

Q Did you see Carl Dixon with a gun in his hand?

A No, sir.

Q Did you hear Carl Dixon say, 'Where is my shit at?'

A No, sir.

Q Did you hear Patrick respond, 'I'll get it to you, man.'?

A No, sir.

Q Did you see Carl Dixon point that gun at Patrick and start firing several times at Patrick?

A No, sir.

Q Did you see Patrick run about a half block and collapse?

A No, sir."

At this point, the prosecutor showed Carlisle the statement he gave to Assistant State's Attorney Studenroth on the day of the killing. Carlisle stated that he recognized it to be a statement. When asked if it was the statement he gave to the assistant State's Attorney, he replied, "I plead the fifth." He was then asked if his signature appeared at the bottom of the page and again he invoked his fifth amendment privilege. The trial court allowed him to utilize this privilege in each of these instances.

The next day, the State called Assistant State's Attorney Studenroth to the stand who testified that he interviewed Carlisle and took his statement. He stated that after he wrote out the statement, he reviewed it with Carlisle "word for word, page by page." Carlisle then signed his name at the bottom of each page as did Studenroth and two police detectives.

After both sides were heard as to the admissibility of Carlisle's statement as a prior inconsistent statement under section 115-10.1, the trial court stated, "I am going to permit it[,] [o]n the basis that this statement is inconsistent with what he testified to yesterday[,] [w]hen these questions were put to him specifically." Therefore, only the portions of Carlisle's statement that directly contradicted his previous testimony were allowed into evidence.

The statement's relevant contents revealed that Carlisle saw defendant get out of the car and walk toward the

victim. He saw defendant with a gun in his hand and heard him ask Marshall, "Where's my shit at?" He also heard Marshall reply, "I'll get it to you man." The statement further reveals that Carlisle saw defendant point the gun at Marshall and fire several times. It also indicates that, after the shooting, Carlisle and the victim began to run. Finally, it states that Carlisle observed the victim collapse after running about 1/2 block.

Defendant now argues that Carlisle's out-of-court statement could not have been inconsistent with his testimony at trial because he invoked his fifth amendment privilege. We disagree.

Defendant was not able to invoke his fifth amendment privilege in all instances and did testify substantively as to his knowledge of the events surrounding the killing of Patrick Marshall. As previously established, Carlisle responded to substantive questions posed by the prosecutor effectively denying the information he gave to Assistant State's Attorney Studenroth. Clearly, the portions of Carlisle's statement were in direct contradiction to his testimony at trial and are, therefore, inconsistent.

Defendant urges us to liken this case to People v. Redd (1990), 135 Ill. 2d 252, when the two are in fact incongruous. In Redd, the witness in question successfully invoked the fifth amendment privilege throughout his entire testimony and failed to answer any questions. The trial court then permitted the introduction of the witness' prior testimony reasoning, "I interpreted [section 115-10.1] to mean that when someone takes the fifth amendment, that is the same as being inconsistent with his testimony at the hearing or trial or in fact as to

the Grand Jury." (Redd, 135 Ill. 2d at 302.) Our supreme court concluded that since the witness did not testify, "it was error to allow him to be impeached by prior statements allegedly made by him * * * ." Redd, 135 Ill. 2d at 317.

Our situation here is dissimilar. Carlisle repeatedly tried to invoke the fifth amendment privilege and the trial court determined, instance by instance, whether he had a valid privilege to invoke. Thus, Carlisle was allowed to take the fifth as to some questions but not as to others. Consequently, unlike Redd and as previously illustrated, he did provide substantive testimony and specific answers to questions posed to him at trial.

We believe portions of Carlisle's statement were properly admitted as substantive evidence because they were in direct contradiction to his prior testimony and inconsistent in accordance with section 115-10.1 of the Code of Criminal Procedure.

The second element of section 115.10.1 requires that the witness must be available for cross-examination concerning his prior statement. This requirement was unequivocally satisfied. At the conclusion of Carlisle's direct examination testimony, the trial court inquired as to whether defense counsel wanted to cross-examine Carlisle. Defense counsel responded, " No cross, your Honor." Defense counsel, then, had the full opportunity to cross-examine Carlisle who was readily available. This is all section 115-10.1 mandates.

Defendant argues that, because Carlisle invoked his fifth amendment privilege on direct examination, he

would have been unavailable to testify on cross-examination. As previously elucidated, Carlisle did testify substantively at trial and defense counsel decided not to cross-examine him presumably because his testimony was favorable to defendant.

This contention further assumes that Carlisle would have asserted his fifth amendment privilege when cross-examined by defense counsel. This, of course, is speculation. Defendant cannot claim a lack of opportunity to cross-examine Carlisle when he did not even attempt to call Carlisle to the stand.

We also reject defendant's assertion that he could not effectively cross-examine Carlisle or challenge the truth of his statement because Carlisle was not on the stand when the statement was admitted into evidence. After Carlisle's prior statement was introduced by Assistant State's Attorney Studenroth, defense counsel specifically asked the trial court if he could recall Carlisle as a rebuttal witness. The trial court granted this request. If necessary, then, defense counsel had the option of recalling Carlisle to rebut the assistant State's Attorney's testimony. Carlisle was thus available to be cross-examined within the meaning of section 115-10.1.

Third, the witness' statement must have been signed by him and must narrate an event within his personal knowledge. Assistant State's Attorney Studenroth testified that he took Carlisle's statement, and saw him read and sign each page of it. At trial, Studenroth identified the statement as the one which he had written and seen Carlisle sign. We believe that, although Carlisle took the fifth when he was shown the statement and asked if it

was his, the testimony of Studenroth is sufficient proof that the statement was made and signed by Carlisle. As the final requirement of section 115-10.1 was satisfied, the trial court did not err in admitting Carlisle's prior inconsistent statement into evidence.

Next, defendant submits that Carlisle's invocation of his fifth amendment privilege against self-incrimination, when asked about the prior inconsistent statement, made him unavailable for cross-examination violating the Confrontation Clause of the sixth amendment. In view of our previous discussion, this issue fails to warrant much attention.

"The Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (United States v. Owens (1988), 484 U.S. 554, 559, 98 L. Ed. 2d 951, 957-58; 108 S. Ct. 838, 842; see People v. Flores (1989), 128 Ill. 2d 66.) As defendant had the opportunity to cross-examine Carlisle, his right to confront witnesses was not violated.

Next, defendant contends that he was not proved guilty beyond a reasonable doubt. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt." (Jackson v. Virginia (1979), 443 U.S. 307, 318, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2788; see People v. Young (1989), 128 Ill. 2d 1.) We believe, based on the evidence presented in the light most favorable to the prosecution, that a rational trier of fact could

have found defendant guilty of first degree murder beyond a reasonable doubt.

Finally, defendant opines that the trial court erroneously denied both his motion for a directed verdict and his motion for a new trial. In furtherance of this position, defendant points solely to the trial court's improper admission of Carlisle's prior inconsistent statement as substantive evidence. We have already determined that the statement was properly admitted.

In ruling on a motion for a directed verdict, "the trial court need consider only whether a reasonable mind could fairly conclude beyond a reasonable doubt the defendant is guilty, considering the evidence most strongly in the People's favor." (People v. Huffman (1988), 177 Ill. App. 3d 713, 722-23.) We believe application of the above standard to this case supports the trial court's denial of defendant's motion for a directed verdict.

The appropriate standard of review for the denial of a motion for a new trial is as follows:

> "The decision of a trial court to grant a new trial is an exercise of discretion which should not be disturbed unless a clear abuse of that discretion is shown. [Citations.] In determining whether that discretion was abused, the reviewing court will consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." Reidelberger v. Highland Body Shop, Inc. (1981), 83 Ill. 2d 545, 548-49.

Based on our thorough review of the record, we do not believe the trial court abused its discretion in denying defendant's motion for a new trial.

For the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

CAHILL, P.J., and HOFFMAN, J., concur.

SUPREME COURT OF ILLINOIS

WEDNESDAY, APRIL 6, 1994

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET ARE DISPOSED OF AS INDICATED:

No. 76732 – People State of Illinois, respondent, v. Carl Dixon, petitioner. Leave to appeal, Appellate Court, First District. (1-92-1075)

Petition for leave to appeal denied.

Supreme Court of the United States

No.

A-1079

Carl Dixon,

Petitioner

v.

Illinois

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

July 26, 1994.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 24th
day of June, 1994.

ORDER

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	NO. 1-92-1075
v.	)	
C.[illegible]L DIXON, Defendant-Appellant.	)	

ORDER

This cause coming on to be heard on Petition for Rehearing, and the Court now being fully advised in the premises:

IT IS ORDERED that said Petition for Rehearing be and the same is hereby denied.

DATED: December 16, 1993

Name

Attorney for

Address

City

Telephone

/s Glenn T. Johnson
Justice

/s Robert Cahill
Justice

/s Thomas E. Hoffman
Justice

GILBERT S. MARCHMAN, CLERK OF THE APPELLATE COURT, FIRST DISTRICT

(2)

Supreme Court, U.S.
FILED
OCT 6 1994
OFFICE OF THE CLERK

No. 94-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CARL DIXON,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

BRIEF IN OPPOSITION TO CERTIORARI

ROLAND W. BURRIS
Attorney General
State of Illinois
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601
Attorney for Respondent

JACK O'MALLEY
State's Attorney
Cook County, Illinois
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
RENEE G. GOLDFARB
Counsel of Record
KEVIN SWEENEY
Assistant State's Attorneys
Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Whether certiorari should be denied because the facts of this case are so unique that they could not lead to any general rule of law.

Whether petitioner's claim is barred by independent and adequate state grounds when the Illinois Appellate Court found that petitioner failed to preserve his claim for review under the applicable state statute.

Whether petitioner got all he was entitled to under the Confrontation Clause when he was given two chances to cross-examine a witness, although he waived cross-examination both times.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Statute Involved	2
Statement of the Case	2
Reasons for Denying the Writ:	
I. CERTIORARI SHOULD BE DENIED BECAUSE THE FACTS OF THIS CASE ARE SO UNIQUE THAT THEY WOULD NOT LEAD TO ANY GENERAL RULE OF LAW	6
II. PETITIONER'S CONFRONTATION CLAUSE ISSUE IS BARRED BY INDEPENDENT AND ADEQUATE STATE GROUNDS, BECAUSE THE APPELLATE COURT OF ILLINOIS FOUND THAT PETITIONER FAILED TO PRESERVE HIS CLAIM UNDER THE APPLICABLE STATE STATUTE	9
III. SINCE PETITIONER HAD TWO SEPARATE OPPORTUNITIES TO CROSS-EXAMINE THE WITNESS AND REFUSED TO DO SO BOTH TIMES, PETITIONER WAS GIVEN HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION	15
Conclusion	25

TABLE OF AUTHORITIES

Cases:	PAGE
California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)	7
Coleman v. Thompson, 501 U.S. 772, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)	13
Delaware v. Fensterer, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)	14, 18
Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)	22
Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)	7, 20
Duncan v. Tennessee, 405 U.S. 127, 92 S. Ct. 785, 31 L. Ed. 2d 86 (1972)	8
Henry v. Mississippi, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965)	10
In re Zisook, 88 Ill. 2d 321, 430 N.E. 2d 1037 (1981)	18
Lee v. Illinois, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986)	21
Michigan v. Lucas, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991)	19, 20
Michigan v. Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)	10
Monks v. New Jersey, 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970)	8
Mancusi v. Stubbs, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972)	19, 20
People v. Dixon, 256 Ill. App. 3d 771, 628 N.E. 2d 399 (1st Dist. 1993)	11

People v. Jones, 123 Ill. 2d 387, 528 N.E. 2d 648 (1988) 12

People v. Redd, 135 Ill. 2d 252, 553 N.E. 2d 316 (1990) 12

People v. Rosenthal, 670 P. 2d 1254 (Colo. Ct. App. 1983) 23

People v. Yarbrough, 166 Ill. App. 3d 825, 520 N.E. 2d 1116 (5th Dist. 1988) 12

State v. Hansen, 312 N.W. 2d 96 (Minn. 1981) ... 23

State v. Smith, 415 A. 2d 553 (Maine 1980) 23

United States v. Adams, 759 F. 2d 1099 (3d Cir. 1985) 23

United States v. Brainard, 690 F. 2d 1117 (4th Cir. 1982) 23

United States v. Flores, 985 F. 2d 770 (5th Cir. 1993) 23

United States v. Harrell, 788 F. 2d 1524 (11th Cir. 1986) 23

United States v. Oropeza, 564 F. 2d 316 (9th Cir. 1977) 23

United States v. Owens, 484 U.S. 554, 108 S. Ct. 383, 98 L. Ed. 2d 951 (1987) 7, 18, 19

United States v. Pelton, 578 F. 2d 701 (8th Cir. 1978) 23

United States v. Salerno, 868 F. 2d 524 (2d Cir. 1989) 23

United States v. Thomas, 571 F. 2d 285 (5th Cir. 1978) 23

Statutes and Rules:

American Bar Association Standards Relating to the Administration of Criminal Justice; Defense Function Standard 4-7.6 22

725 ILCS 5/115-10.1 ..... 9, 10

U.S. Const., Amend. VI 6

U.S. Sup. Ct. Rule 10.1(c) 6, 8

No. 94-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CARL DIXON,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

BRIEF IN OPPOSITION TO CERTIORARI

OPINION BELOW

The opinion in this matter of the Appellate Court of Illinois, First Judicial District, is reported as *People v. Dixon*, 256 Ill. App. 3d 771, 628 N.E. 2d 399 (1st Dist. 1993).

STATUTE INVOLVED

725 ILCS 5/115-10.1 provides in pertinent part:

> Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement . . . narrates, describes or explains an event or condition of which the witness had personal knowledge, and . . . the statement is proved to have been written or signed by the witness. . . .

STATEMENT OF THE CASE

Petitioner Carl Dixon was convicted at a bench trial in Chicago of the first degree murder of Patrick Marshall. The Appellate Court of Illinois affirmed, holding that petitioner had been given his constitutional right to confront witness Christopher Carlisle. *People v. Dixon*, 256 Ill. App. 3d 771, 628 N.E. 2d 399 (1st Dist. 1993). The Appellate Court said: "As defendant had the opportunity to cross-examine Carlisle, his right to confront witnesses was not violated." 256 Ill. App. 3d at 778, 628 N.E. 2d at 907.

Evidence at Trial

Alzola Breaux, sister of the victim's fiancee, testified that the victim Patrick Marshall was at home around 11:30 p.m. on May 11, 1990 when he said that he was going out with some friends for a couple of beers. (Record on Appeal or "R." A12) Ms. Breaux never saw Patrick Marshall alive again.

Officer Darryl Cavin was working the midnight shift on the south side of Chicago on May 12, 1990 when he re-

sponded to a call of a man shot. (R. A17) Officer Cavin found the body of Patrick Marshall lying face down on the street and saw Christopher Carlisle standing next to the body. (R. A18-A19)

Evidence Technician Joseph Moran testified that four discharged .25 caliber shells were found at the crime scene. (R. A29)

Ashadu McPherson testified that he had seen the victim steal a handgun from petitioner during the night of the murder and had seen petitioner with other guns trying to hunt down the victim. McPherson said that a couple of hours before the murder he had been part of a group of men who met in a schoolyard and that petitioner, the victim and Christopher Carlisle had been part of that group. (R. A34) The men passed around a 9 millimeter automatic and the victim Patrick Marshall broke and ran after taking that gun from petitioner. (R. A36) Petitioner tried to run after the victim, but gave up and went into his home and got a shotgun. (R. A37-A38) Then petitioner drove around the neighborhood with the shotgun trying to find the victim. (R. A39) A couple of hours later McPherson drove around the neighborhood again with petitioner, but at that time petitioner had a .25 caliber handgun. (R. A41) Petitioner said that if he didn't get his gun back he would have to do something to the victim. (R. A42-A43)

Charles Jemison testified that he had been with petitioner and McPherson when petitioner was driving around with his shotgun trying to find the victim. (R. A46-A48) Jemison had seen petitioner point the shotgun at another man and demand to be told where the victim was. (R. A49)

It was stipulated that a deputy medical examiner would testify that the victim Patrick Marshall died of three gunshot wounds to the back region. (R. B18-B20) The wounds were inflicted by .25 caliber bullets. (R. B20)

Christopher Carlisle was called to the stand by the State. This witness had given a written statement saying that he had seen petitioner shoot the victim. This was also the witness that petitioner's attorney twice refused to cross-examine. (R. A66, R. B22) Carlisle testified that he had been a friend of petitioner all his life. (R. A57) When asked if he was still a friend of petitioner Carlisle tried to plead the Fifth Amendment but the trial judge ordered him to answer. (R. A58) Carlisle then admitted that he was still petitioner's friend.

Carlisle then testified (without claiming any privilege) that he had been with the victim Patrick Marshall at the time and place of the murder. (R. A58) According to Carlisle a green car pulled up next to the victim, but Carlisle claimed that he did not know who owned the car and that it was too dark for him to see anyone get out of the car. (R. A59) When asked if he had seen petitioner get out of the car Carlisle again pleaded the Fifth Amendment, but again was ordered to answer by the trial judge. (R. A59) Carlisle then said that he did not see defendant get out of the car. (R. A60)

The prosecutor then asked a series of leading questions which together covered everything in Carlisle's written statement which had implicated defendant in the murder of Patrick Marshall. In each question the prosecutor quoted a sentence from the written statement and then asked Carlisle if that sentence was correct. In response to each leading question Carlisle denied that the information was true. (R. A60-A61) Specifically, Carlisle denied that he had seen petitioner walk up to the victim, say "where is my shit at" and then shoot the victim several times. (R. A60)

Then the prosecutor questioned Carlisle about the written statement and Carlisle admitted that he had given a statement to Assistant State's Attorney David Studenroth on the

morning of May 12, 1990 in the lobby of the police station on 103rd street. (R. A62-A63) However, when the prosecutor questioned Carlisle about what was in the statement Carlisle pleaded the Fifth Amendment yet again and this time the trial judge sustained that plea. Carlisle did deny that he had been threatened by defendant and denied that he was afraid of defendant. (R. A64) He also testified that nine months after the murder he had given a statement about the case to a court reporter at the office of petitioner's attorney. (R. A65-A66)

Defense counsel waived cross-examination at that point, but asked that the sheriff return Carlisle (who was in custody on an unrelated matter) to court the next day to testify as a possible rebuttal witness. (R. A67) The trial judge ordered that Carlisle be brought back to court. (R. A67)

Assistant State's Attorney David Studenroth testified about the written and signed statement he had taken from Christopher Carlisle which incriminated petitioner. Studenroth testified that Carlisle had not been a suspect in the murder case, but only a witness. Carlisle had told the assistant state's attorney that, at the time and place of the murder, Carlisle had seen petitioner get out of a car holding a gun in his hand. (R. B11) Petitioner said to the victim, "where's my shit at," and the victim said, "I'll get it to you man." (R. B12) Petitioner then pointed the gun at the victim and fired several times. (R. B12) The victim began to run, but collapsed after half a block. (R. B12)

Under the authority of an Illinois statute, the trial judge admitted as substantive evidence those portions of Christopher Carlisle's written statement which were inconsistent with Carlisle's testimony at trial. 725 ILCS 5/115-10.1. Petitioner's attorney declined to recall Carlisle to the witness stand and rested without presenting any evidence. (R. B22)

The trial judge found petitioner guilty of first degree murder and later sentenced petitioner to 20 years in custody. (R. B35, D5)

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE FACTS OF THIS CASE ARE SO UNIQUE THAT THEY WOULD NOT LEAD TO ANY GENERAL RULE OF LAW.

The facts of this case are so peculiar that they are not going to be duplicated in any other case. Moreover, any decision on the Confrontation Clause issue here would depend on the unique facts of this case and therefore any ruling by this Court in this matter would not lead to any general rule of law. U.S. Const., Amend. VI. Therefore certiorari should be denied, because the precious time and resources of this Court should not be wasted on a case of no general importance. U.S. Sup. Ct. Rule 10.1(c).

There are three unique things about this case which are not likely to all be found in any other criminal matter:

1. The witness who gave an out-of-court statement pleaded his right against self-incrimination to some but not all of the questions put to him by the State at trial, and there was no predictable pattern in when that witness pleaded the Fifth Amendment.
2. The trial judge upheld some of the attempts of that witness to plead the Fifth Amendment but overruled others, and those rulings by the judge were not predictable.
3. Defense counsel at trial did not try to cross-examine the witness either before or after the incriminating out-of-court statement was admitted into evidence.

Since all these unique facts would be central to any ruling by this Court on the Confrontation Clause issue, that ruling would not amount to any principle of law which could be generally applied in criminal cases.

It is settled law that when a witness refuses on grounds of self-incrimination to answer *any* questions put to him at trial, then the Confrontation Clause has not been satisfied and an out-of-court statement by that witness is ordinarily inadmissible. *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). It is also settled law that when a defendant has the opportunity to cross-examine a witness, even when that opportunity is not as complete as the defense might wish, then an out-of-court statement by that witness can be admitted without violating the Confrontation Clause. *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 383, 98 L. Ed. 2d 951 (1987); *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Here, however, there is a strange variation on the two situations that is unlikely to be duplicated in any other case.

Here on direct examination Christopher Carlisle voluntarily answered some questions, was forced by the trial judge to answer others and successfully refused to answer a third group of questions. The defense did not even try to cross-examine the witness, so there is no way of telling what Carlisle would have said or refused to say if petitioner's attorney had tried to question him. Petitioner asks this Court to rule that there was no opportunity for effective cross-examination, but this Court could do so only by guessing at the hypothetical content of a cross-examination that never happened.

Therefore any ruling by this Court on the Confrontation Clause issue would depend on the unique facts of this case and would not be a particularly useful guide in other matters. This Court might rule that because Carlisle

answered some highly relevant questions, and because the defense did not even try to cross-examine him on any subject, then the Confrontation Clause was satisfied. On the other hand, this Court might rule that since Carlisle successfully refused to answer some questions then the Confrontation Clause was violated, even though the defense did not try to cross-examine him. Either ruling would depend on the unique pattern of direct examination in this case and on the unusual decision by the defense not to cross-examine. Therefore such a ruling would not lead to any general rule of law which could guide judges in others Confrontation Clause cases.

Accordingly this Court should deny certiorari because this case involves no ". . . important question of federal law which has not been, but should be, settled by this Court. . . ." U.S. Sup. Ct. Rule 10.1(c). The general principles of law which apply to Confrontation Clause issues have already been decided by this Court, and they would not be significantly clarified by any ruling on the unique facts of this case. A grant of certiorari is inappropriate when, because of the particular facts of the case, a decision by this Court would not establish a significant rule of law. *Duncan v. Tennessee*, 405 U.S. 127, 92 S. Ct. 785, 31 L. Ed. 2d 86 (1972); *Monks v. New Jersey*, 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970).

In most cases a witness either will or will not invoke his right against self-incrimination when questioned about a crime. Here the witness pled the Fifth Amendment to some questions but not others. In most cases a judge either will or will not allow a witness to refuse to answer questions on grounds of possible self-incrimination. Here the trial judge allowed the witness to refuse to answer some questions, but ordered the witness to answer others. In most cases a defense lawyer will cross-examine a witness who gives im-

portant testimony about a crime, or at least the lawyer will not refuse to cross-examine and then claim that the Confrontation Clause was violated. Here, on the other hand, petitioner's trial attorney declined to cross-examine the witness, but petitioner claimed on appeal that his right to effective cross-examination had been denied. The facts of this case, insofar as they are relevant to the Confrontation Clause, are not likely to reoccur in any other case. Therefore this Court should deny certiorari since there is no question of general importance to be decided here.

II.

PETITIONER'S CONFRONTATION CLAUSE ISSUE IS BARRED BY INDEPENDENT AND ADEQUATE STATE GROUNDS, BECAUSE THE APPELLATE COURT OF ILLINOIS FOUND THAT PETITIONER FAILED TO PRESERVE HIS CLAIM UNDER THE APPLICABLE STATE STATUTE.

Petitioner argues that he can raise his Confrontation Clause issue in this Court even though his trial lawyer twice refused to try to cross-examine the witness whose out-of-court statement was admitted into evidence. However, the steps necessary to preserve a claim for review in state court are not a matter of federal constitutional law, but rather a matter of state law. As the Appellate Court of Illinois found, under the Illinois statute governing admission of out-of-court statements it is necessary to try to cross-examine a witness before claiming on appeal that the witness was not available for cross-examination. 725 ILCS 5/115-10.1. Petitioner's failure to comply with the requirements of the statute is an independent and adequate ground for the decision of the Appellate Court of Illinois. Therefore petitioner has left this Court with nothing to review, since his Confrontation Clause issue is barred on independent and adequate state grounds.

"Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512, n. 7, 98 S. Ct. 1942, 1951 n. 7, 56 L. Ed. 2d 486, 500 n. 7 (1978). See also *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965). Illinois has a specific statute governing the conditions under which the out-of-court statement of a witness may be admitted into evidence after that witness testifies at a criminal trial. 725 ILCS 5/115-10.1. One of the conditions for admission of an out-of-court statement under the statute, as under the Confrontation Clause, is that the witness be subject to cross-examination. 725 ILCS 5/115-10.1(b). The Illinois reviewing court held that petitioner was barred from claiming on appeal that Christopher Carlisle was not available for cross-examination when defense counsel did not even try to cross-examine him.

In holding that petitioner's claim was barred under the statute, the Appellate Court of Illinois said:

> The second element of section 115-10.1 requires that the witness be available for cross-examination concerning his prior statement. This requirement was unequivocally satisfied. At the conclusion of Carlisle's direct examination testimony, the trial court inquired as to whether defense counsel wanted to cross-examine Carlisle. Defense counsel responded, "No cross, your Honor." Defense counsel, then, had the full opportunity to cross-examine Carlisle who was readily available. This is all section 115-10.1 mandates.
>
> Defendant argues that, because Carlisle invoked his fifth amendment privilege on direct examination, he would have been unavailable to testify on cross-examination. As previously elucidated, Carlisle did testify substantively at trial and defense counsel decided not

> to cross-examine him presumably because his testimony was favorable to defendant.
>
> This contention further assumes that Carlisle would have asserted his fifth amendment privilege when cross-examined by defense counsel. This, of course, is speculation. Defendant cannot claim a lack of opportunity to cross-examine Carlisle when he did not even attempt to call Carlisle to the stand. *People v. Dixon*, 256 Ill. App. 3d 771, 776-77, 628 N.E. 2d 399, 403-04 (1st Dist. 1993).

Thus the Illinois reviewing court held that under the statute petitioner, having not even attempted to cross-examine a witness who had given substantive testimony on direct, had failed to preserve for review the claim that the witness was not available for cross-examination.

Later in its opinion the Illinois reviewing court held that, having failed to preserve his claim under the statute governing admission of out-of-court statements by a witness, petitioner had also forfeited his related claim under the Confrontation Clause. That court said: "As defendant had the opportunity to cross-examine Carlisle, his right to confront witnesses was not violated." 256 Ill. App. 3d at 778, 628 N.E. 2d at 404. Thus the Illinois reviewing court held that petitioner, being barred under the statute from claiming that the witness was not available for cross-examination, was also barred on the same grounds from claiming that he was denied the right to confront that witness.

Although the facts of this case are unusual, the Illinois reviewing court simply applied established Illinois law in holding that petitioner had forfeited his Confrontation Clause issue by not even trying to cross-examine the witness. In fact there is a definitive decision of the Illinois Supreme Court holding that a defendant who does not try to cross-examine a witness waives any claim that he was denied his constitutional right to confrontation. *People v.*

Jones, 123 Ill. 2d 387, 528 N.E. 2d 648 (1988). In *Jones* the Illinois Supreme Court said:

> In this case, however, defense counsel made no attempt to question Mr. Dare, and we decline to speculate whether the witness would or would not have responded to cross-examination on those matters to which he testified on direct. Without more, we are unable to conclude here that the defendant was denied his right to confront the witness. 123 Ill. 2d at 407, 528 N.E. 2d at 657.

Thus the highest court of Illinois has held in a definitive ruling that a defendant who does not even try to cross-examine a witness has waived the constitutional claim that he was denied the right to confront that witness. Thus the Illinois Appellate Court in petitioner's case simply enforced an established state procedural rule in holding that petitioner failed to preserve his Confrontation Clause issue for appeal when he refused to cross-examine the witness.[1]

The steps necessary to preserve an issue for appellate review are a matter of state law, not federal constitutional law. When a defendant has failed to preserve a claim for

---

[1] The Illinois courts have recognized, however, that when a witness refuses to answer *all* questions then the witness is not available for cross-examination and an out-of-court statement by that witness is not admissible under the Illinois statute. *People v. Redd*, 135 Ill. 2d 252, 553 N.E. 2d 316 (1990). Thus in a case in which a witness refused to answer any further questions and asked to be sent to jail for contempt, it was held that the witness was not available for cross-examination even though the defense did not attempt to question the witness. *People v. Yarbrough*, 166 Ill. App. 3d 825, 520 N.E. 2d 116 (5th Dist. 1988). *Redd* and *Yarbrough* are consistent on their facts and their logic with the ruling of the Appellate Court of Illinois in petitioner's case. Here Christopher Carlisle never refused to answer any question when ordered to do so and here Carlisle had given important substantive testimony on direct examination. Therefore the only way to find out if Carlisle was available for cross-examination would have been to try to cross-examine him.

review in accordance with state law, then review by this Court is barred provided the state has a legitimate interest in enforcing its rule. "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 772, 111 S. Ct. 2546, 2553-54, 115 L. Ed. 2d 640, 655 (1991). The procedure necessary to preserve petitioner's Confrontation Clause issue for appellate review is and ought to be a question of Illinois law.

Illinois has a legitimate interest in requiring a defendant to try to cross-examine a witness before claiming on appeal that the defense was denied effective cross-examination. Only if defense counsel attempts to cross-examine a witness will the reviewing court know what questions the defense wished to ask and whether the witness was willing to answer them. If the defense refuses to even try to cross-examine then the Confrontation Clause issue is abstract, since the reviewing court will have no way of knowing what cross-examination would have been attempted. But when defense counsel tries to cross-examine the witness then the issue on appeal is concrete, since the reviewing court will know what questions the witness answered or refused to answer. Certainly a state has a legitimate interest in seeing that concrete and specific issues are presented to its reviewing courts for decision. Only then can important questions, such a harmless error, be decided in a realistic fashion. Therefore the Illinois rule on Confrontation Clause issues is based on a legitimate state interest and is binding on federal review.

Petitioner has attempted without discussion to turn a question of state appellate procedure into one of federal constitutional law. His petition argues that a defendant

should not have to go through the allegedly futile act of attempting to cross-examine a witness who has refused on Fifth Amendment grounds to answer some of the questions on direct examination. (Pet. 13-19) Whatever one thinks of petitioner's argument, it deals with a policy question on criminal procedure rather than any issue under the Sixth Amendment. The Confrontation Clause guarantees the right to reasonably effective cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). It says nothing about how an issue under that clause should be preserved for review in state court. Here petitioner failed to preserve his constitutional claim under a reasonable rule of Illinois law, so review by this Court is barred.

It should be noted that on the facts of this case Illinois has a particularly strong interest in enforcing its rule. The witness in question, Christopher Carlisle, voluntarily answered some important questions on direct examination and answered other important questions after he was ordered to do so. He successfully pled his privilege against self-incrimination only to a limited number of questions. Therefore defense counsel should have attempted to cross-examine Carlisle, as Illinois law requires in order to preserve the Confrontation Clause issue for review. It is entirely possible that Carlisle was willing to answer or would have been ordered to answer the questions, if any, that defense counsel wanted to ask.

Illinois law requires a defendant, before asserting on appeal that he was denied the right to effective cross-examination, to actually attempt to cross-examine the witness. That is a reasonable state rule supported by a legitimate state interest. It provides an independent and adequate state ground for the reviewing court decision in this case, so petitioner has no legal basis for requesting review by this Court.

III.

SINCE PETITIONER HAD TWO SEPARATE OPPORTUNITIES TO CROSS-EXAMINE THE WITNESS AND REFUSED TO DO SO BOTH TIMES, PETITIONER WAS GIVEN HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION.

Petitioner asks this Court to speculate about the content of a cross examination which never took place. He claims he was denied his rights under the Confrontation Clause, but he twice refused to cross-examine the witness when he had a chance to do so. Since petitioner was given chances to cross-examine Christopher Carlisle, he was given his constitutional right to confront that witness. As for petitioner's argument that he was denied the right of effective cross-examination, that is pure speculation which is not supported by the record. The record shows that the witness would have answered at least some questions about the murder, but petitioner deprived this Court of any chance to know if the witness would have answered whatever questions defense counsel might have asked on cross-examination. Since petitioner was given the chance to cross-examine but refused to do so, he was given everything that the Confrontation Clause requires.

As noted, on direct examination by the State Christopher Carlisle voluntarily answered some questions, was ordered by the trial judge to answer other questions and successfully pled his right against self-incrimination as to a third group of questions. After Carlisle testified, petitioner's attorney said, "No cross, your Honor." (R. A66) However, petitioner's attorney asked that Carlisle, who was in custody on an unrelated matter, be returned by the sheriff to the court the next day for possible testimony. Petitioner's attorney said:

> [PETITIONER'S ATTORNEY]: Your Honor, may I ask that the writ of habeas corpus [*ad testificandum*] that was issued for Mr. Carlisle issue for tomorrow, in case I need him as a rebuttal witness?
>
> THE COURT: Sure. Writ is continued. (R. A67)

Thus petitioner's trial attorney certainly did not think that Carlisle was unavailable for examination by the defense, since petitioner's attorney asked that Carlisle be returned to court so that the defense would have a chance to recall him. However, the next day defense counsel rested at trial without recalling Carlisle. (R. B22)

Petitioner asserts without justification that the witness Christopher Carlisle certainly would have refused to answer questions if defense counsel had tried to cross-examine him. That assertion is just not supported by the record. On direct examination Carlisle did answer some questions voluntarily and was ordered by the trial judge to answer others. Moreover, the record suggests that Carlisle did not really fear self-incrimination but was actually refusing to cooperate with the prosecution because he wanted to help petitioner get an acquittal. Therefore the record shows that it is entirely possible that Carlisle would have answered whatever questions defense counsel might have put to him at trial. Since petitioner had a chance to cross-examine the witness at trial, and since the record shows that the witness might have answered petitioner's hypothetical questions, petitioner was given his Sixth Amendment right to confront witnesses.

On direct examination by the State the witness Christopher Carlisle voluntarily testified that he had been present at the scene of the murder at the time the victim was killed, and had seen the car used by the murderer drive up to the victim. (R. A58) Carlisle also voluntarily testified that for all his life he had been a friend of petitioner. (R.

A58) In addition, Carlisle testified that he remembered giving a statement to an assistant state's attorney at a police station. (R. A61) Also, Carlisle voluntarily testified that before trial he had gone to the office of petitioner's attorney and had given a statement to a court reporter about the case. (R. A65-A66)

Carlisle attempted to plead his right against self-incrimination as to what he saw at the time of the murder, but the trial judge ruled that such testimony would not be incriminating to Carlisle and ordered Carlisle to answer. (R. A59-A60) Then Carlisle testified about what he had seen at the time of the murder, denying that he had seen petitioner shoot and kill the victim. (R. A59-A61)

Thus Christopher Carlisle gave at least some testimony about every aspect of this case. He testified about what he had seen at the time of the murder, about his relationship with petitioner, and about his written statements given to the prosecution and the defense. He successfully pled the Fifth Amendment only about the content of his written statement to the assistant state's attorney. (R. A63-A64) There is no way of telling from the record what defense counsel might have asked on cross-examination or whether Carlisle would have answered those questions.

The only thing that is certain from the record is that petitioner's attorney twice refused to cross-examine the witness. There is nothing in the record to show that defense counsel wanted to ask any questions of Christopher Carlisle, that Carlisle would have refused to answer those unknown questions or that the trial judge would have allowed Carlisle to refuse to do so. Petitioner's argument, that he did not have a chance to effectively cross-examine the witness, is based on nothing but unsupported speculation. Since petitioner was given two chances to cross-examine the witness, but refused to do so, petitioner was given his rights under the Confrontation Clause.

Indeed, the record suggests that the witness Christopher Carlisle was trying to help petitioner and might have been entirely cooperative if questioned by defense counsel. After all, petitioner and Carlisle were lifelong friends. (R. A58) In addition, Carlisle was in custody on an unrelated matter and may have feared cooperating with the prosecution against a fellow inmate. (R. A67) Also, Carlisle had gone to the office of petitioner's attorney and repudiated the written statement he had given to the assistant state's attorney. (R. A4-A5, A65-A66) The point is that on the facts of this case the only way to find out if Carlisle would have answered questions on cross-examination would have been to ask those questions.[2]

The Confrontation Clause guarantees an adequate opportunity to cross-examine an adverse witness, but does not guarantee cross-examination which is effective in whatever way and to whatever extent that the defendant might wish. *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988); *Delaware v. Fensterer*, 474 U.S. 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985). More importantly, if cross-examination has been restricted as a result of a defendant's own actions, then there is no violation of the Con-

---

[2] Indeed, the trial judge implicitly found that Carlisle had no reasonable grounds to fear self-incrimination with respect to the murder, but was merely pleading the Fifth Amendment in order to avoid testifying against petitioner. See *In re Zisook*, 88 Ill. 2d 321, 430 N.E. 2d 1037 (1981). The trial judge ordered Carlisle to testify as to what he had seen at the time and place of the murder, even though Carlisle had tried to plead his right against self-incrimination. (R. A58-A59) But the trial judge sustained Carlisle's Fifth Amendment plea to questions about his written statement, presumably to protect Carlisle from incriminating himself on a perjury charge for false testimony at trial favoring petitioner. (R. A63-A64) In any event, the correctness of the trial judge's rulings on Carlisle's Fifth Amendment rights is not at issue in this matter.

frontation Clause. *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991); *Mancusi v. Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972). Here petitioner's trial attorney twice refused to cross-examine Christopher Carlisle when given the opportunity, so the only restriction on cross-examination shown by the record was the result of petitioner's own choice.

In the *Owens* and *Fensterer* cases this Court held that the Confrontation Clause may be satisfied even if a State's witness cannot be cross-examined by the defense on some important aspects of his testimony. In *Owens* a witness, because of severe brain damage, had no recollection at the time of trial of the attack which injured him. *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). In *Fensterer* an expert witness testified about his findings, but could not remember how he had reached those conclusions. In each case this Court held that the defendant had been given his constitutional right to confront those witnesses, even though the witnesses were effectively unavailable for cross-examination on important subjects. Similarly, petitioner here was given his right to confront Christopher Carlisle, although Carlisle had refused to answer questions on one subject on direct examination and might (or might not) have refused to answer some questions on cross-examination.

But it is more important that the record does not show what, if any, restrictions were imposed on petitioner's cross-examination because petitioner's trial attorney did not attempt to cross-examine the witness. In the *Lucas* and *Stubbs* cases this Court held that when apparent restrictions on cross-examination were the result of defense counsel's own actions, then there is no violation of the Confrontation Clause. In *Lucas* a defendant charged with rape was unable to cross-examine the victim about her past

sexual relations with that defendant because defense counsel had failed to move for a hearing under a rape shield statute. *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991). This Court held that since the defendant's own attorney was responsible for the restriction on cross-examination, there was no violation of the Confrontation Clause. In *Stubbs* the defendant's attorney at a previous trial, either through lack of preparation or through trial strategy, avoided a certain line of cross-examination of a key witness. *Mancusi v. Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972). This Court held when the witness was unavailable at a second trial a transcript of his testimony could be admitted, although defense counsel at the second trial wanted to ask the questions the defense avoided at the first trial. Thus when a restriction on cross-examination is the result of the actions of defense counsel, then there is no violation of the Confrontation Clause.

Here petitioner's trial attorney twice refused to try to cross-examine Christopher Carlisle. As a result we do not know what questions might have been asked on cross-examination or whether Carlisle would have answered them. The only person who restricted cross-examination of the witness was petitioner's own attorney, so there has been no violation of the Confrontation Clause.

Petitioner relies heavily on the *Douglas* decision of this Court, but that was a case where there could be no cross-examination because there was no testimony of substance on direct examination. *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). In *Douglas* the State called a witness who refused on grounds of self-incrimination to answer any questions other than to give his name and address. This Court held that an out-of-court statement by the witness was inadmissible. Here, on the other hand, Christopher Carlisle voluntarily answered a

number of important questions on direct examination and was ordered by the trial judge to answer others. Realistically, there is just no way of knowing what questions he might have been asked on cross-examination or whether he would have answered them. Thus the situation in *Douglas*, where there was absolutely nothing to cross-examine on and the witness refused to answer every question, is certainly not present here. In *Douglas* there was no testimony by the witness and no possibility that any questions would have been answered on cross-examination. In petitioner's case there was important testimony by the witness on direct examination and it was certain that the witness would have answered at least some question on cross. Thus *Douglas* is just not on point here, since the facts surrounding any opportunity to cross-examine were completely different than they were at petitioner's trial.

Petitioner also relies on the *Lee* decision, in which this Court specifically refused to address the question of whether a co-defendant was available for cross-examination after the co-defendant's out-of-court statement was admitted into evidence against the defendant. *Lee v. Illinois*, 476 U.S. 530, 539, 106 S. Ct. 2056, 2061, 90 L. Ed. 2d 514, 525 (1986). Thus *Lee* has nothing to do with this case, particularly as Christopher Carlisle was not a co-defendant, did take the stand and did give important testimony on direct examination.

Petitioner simply asserts that his attorney refused to try to cross-examine Christopher Carlisle because that attorney thought that any attempt at cross-examination would be futile. (Pet. 5, 7) The record does not support that assertion. The common-sense explanation of defense counsel's refusal to cross-examine is that he was afraid, not that Carlisle would refuse to testify, but that Carlisle would testify on cross and hurt the defense. As the trial judge found,

Carlisle had seen petitioner shoot the victim to death. Nevertheless, on direct examination Carlisle denied that he had seen any such thing. (R. A58-A61) The record suggests that petitioner's attorney thought that the defense had done as well as it could with Christopher Carlisle, and that cross-examination could only hurt the defense.

In other words, for understandable reasons petitioner's trial attorney twice refused to cross-examine a witness. Petitioner is bound by that decision, so he has no claim under the Confrontation Clause.

Ethics

Petitioner makes the strange suggestion that it would have been unethical for his trial attorney to try to cross-examine Christopher Carlisle. (Pet. 20-21) However, since Carlisle had given some important testimony on direct, cross-examination of him would have been entirely proper. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). This is particularly true as it was unclear to what extent Carlisle would plead the privilege against self-incrimination on cross-examination and to what extent the trial judge would sustain that plea.

Petitioner relies on an American Bar Association Standard providing that defense counsel shall not call a witness in the presence of a jury when the lawyer knows that the witness will claim a valid privilege not to testify. ABA Standards Relating to the Administration of Criminal Justice; Defense Function Standard 4-7.6. That is not a rule of law applying to Illinois trials and, even if it were, by its own terms it would not have applied at petitioner's trial. This was a bench trial, so there was no jury to be prejudiced or misled if Carlisle had pled the Fifth Amendment on cross-examination. Petitioner also cites cases saying a defendant has no right to call a witness who is certain to refuse to

testify on grounds of self-incrimination. However, Christopher Carlisle was not called by petitioner but by the State, and had given important testimony on direct examination.

Alleged Conflict of Authority

Petitioner falsely claims that there is a conflict of authority on whether a defendant must attempt to question a witness before claiming on appeal that the witness was not available to testify. (Pet. 17-19) In fact the cases cited by petitioner follow a reasonably consistent rule of law and if the results of those cases vary it is because the facts of the cases also vary.

Petitioner cites certain cases holding that a witness was unavailable to testify and that thus an out-of-court statement was admissible under some rule of evidence. *United States v. Flores*, 985 F. 2d 770 (5th Cir. 1993); *United States v. Harrell*, 788 F. 2d 1524 (11th Cir. 1986); *United States v. Adams,* 759 F. 2d 1099 (3d Cir. 1985); *United States v. Brainard*, 690 F. 2d 1117 (4th Cir. 1982); *United States v. Thomas*, 571 F. 2d 285 (5th Cir. 1978); *State v. Hansen*, 312 S.W. 2d 96 (Minn. 1981); *State v. Smith*, 415 A. 2d 553 (Maine 1980). But in those cases the declarant was either a co-defendant at the same trial or had specifically refused in person or through counsel to testify to anything, so the facts of the case showed that the declarant was unavailable.

On the other hand, petitioner cites certain cases in which a declaration against penal interest was held to be inadmissible because the declarant was not shown to be unavailable to testify. *United States v. Salerno*, 868 F. 2d 524 (2d Cir. 1989); *United States v. Pelton*, 578 F. 2d 701 (8th Cir. 1978); *United States v. Oropeza*, 564 F. 2d 316 (9th Cir. 1977); *People v. Rosenthal*, 670 P. 2d 1254 (Colo. Ct. App. 1983). However, in none of those cases was the declarant a co-defendant at the same trial and in none of those cases

did the declarant actually claim the privilege against self-incrimination. Therefore the reviewing courts ruled on the facts that the witness was not shown to be unavailable. Accordingly, there is no conflict between the two groups of cases cited by petitioner, since in all such cases availability of a witness was determined according to the particular facts in the record.

Also, most of the lower court precedents cited by petitioner do not rely on the Confrontation Clause to decide the case. The decision in most of those cases is based on a state or federal rule of evidence rather than any constitutional provision. Therefore not only do the cases cited by petitioner fail to show a conflict of authority, most are not even relevant to this matter. They have nothing to do with petitioner's claim that the Confrontation Clause imposes a uniform procedural rule on all criminal cases in all state and federal courts.

Summary

Petitioner claims that he was denied the right to confront a witness against him although petitioner's attorney twice refused to try to cross-examine that witness. Petitioner's whole argument for a grant of certiorari is based on his assertion that it was "beyond question" that Christopher Carlisle would refuse to testify on cross-examination (Pet. 20) That assertion is false and because it is false there is no reason for this Court to review this case. On direct examination Carlisle answered some questions voluntarily and was ordered by the trial judge to answer others. Carlisle successfully pled the Fifth Amendment only as to questions on a single subject, but the record suggests that he did so to protect petitioner rather than because he actually feared self-incrimination. What Carlisle, defense counsel and the trial judge might have done on cross-examination is any-

body's guess. However, it is certain that the facts of this case are unique to the point that review by this Court would not lead to any general rule of law. A defendant who refuses to even try to cross-examine a witness should not claim on appellate review that he was denied any right under the Confrontation Clause. Accordingly, this Court should deny certiorari.

CONCLUSION

Respondent, the State of Illinois, respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General
State of Illinois
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601
Attorney for Respondent

JACK O'MALLEY
State's Attorney
Cook County, Illinois
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
RENEE G. GOLDFARB
Counsel of Record
KEVIN SWEENEY
Assistant State's Attorneys
Of Counsel

(3)

94-173

No. 94-193

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CARL DIXON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois

REPLY BRIEF OF THE PETITIONER

LAWRENCE C. MARSHALL
Counsel of Record
357 East Chicago Ave.
Chicago, Illinois 60611
(312) 503-7412

JEFFREY URDANGEN
343 S. Dearborn St., Ste. 1510
Chicago, Illinois 60604
(312) 939-0330

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. MR. DIXON'S CONFRONTATION CLAUSE CLAIM WAS DECIDED ON ITS MERITS, NOT ON THE BASIS OF ANY INDEPENDENT AND ADEQUATE STATE GROUND 1

II. THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE THAT HAS BEEN THE SUBJECT OF A CONFLICT AMONG THE LOWER COURTS 3

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Ford v. *Georgia*, 498 U.S. 411 (1991) 3

Harris v. *Reed*, 489 U.S. 255 (1989) 2

Michigan v. *Long*, 463 U.S. 1032 (1983) 2

People v. *Flores*, 128 Ill. 2d 66, 538 N.E.2d 489 (1989) 2

People v. *Owens*, 484 U.S. 554 (1988) 2

People v. *Yarbrough*, 166 Ill. App. 3d 825, 520 N.E.2d 116 (5th Dist. 1988) 3

United States v. *Adams*, 759 F.2d 1099 (3d Cir. 1985) 7

United States v. *Pelton*, 578 F.2d 701 (8th Cir. 1978) 7

INTRODUCTION

The State adeptly has invoked two of the primary tools used by those who seek to persuade this Court to deny petitions for certiorari. First, the State argues that the decision below was based upon an independent and adequate state ground. Second, the State claims that the factual pattern of this case is peculiar in a way that makes it unsuited for certiorari. As will be seen, though, neither of these arguments has any merit. This case squarely presents a significant federal constitutional question that has been the subject of conflicting resolutions by lower federal and state courts. It plainly meets this Court's criteria for certiorari, and the Court should not forego the opportunity to resolve the question presented and to remedy the constitutional wrong that led to Mr. Dixon's conviction.

I. MR. DIXON'S CONFRONTATION CLAUSE CLAIM WAS DECIDED ON ITS MERITS, NOT ON THE BASIS OF ANY INDEPENDENT AND ADEQUATE STATE GROUND.

There is no need for much response to the State's contention that the decision of the court below was supported by an independent and adequate state ground. Contrary to the State's assertion, Mr. Dixon's Confrontation Clause claim was plainly rejected on its merits – on the basis of the Illinois court's understanding of this Court's Confrontation Clause decisions. The decision of the court speaks for itself on this point:

> Next, defendant submits that Carlisle's invocation of his fifth amendment privilege

> against self-incrimination, when asked about the prior inconsistent statement, made him unavailable for cross-examination violating the Confrontation Clause of the sixth amendment. In view of our previous discussion, this issue fails to warrant much attention.
>
> "The Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (*United States v. Owens* (1988), 484 U.S. 554, 559, 108 S.Ct. 838, 842, 98 L.Ed.2d 951, 957-58; *see People v. Flores* (1989), 128 Ill.2d 66.) As defendant had the opportunity to cross-examine Carlisle, his right to confront witnesses was not violated. (App. 10)

Nowhere, in this discussion is there any mild hint, much less the "plain statement" required by *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983), that this decision is based on some state law procedural ground. See generally *Harris* v. *Reed*, 489 U.S. 255 (1989).

The Illinois court may or may not have invoked some state law limitation on Mr. Dixon's right to raise his state-law objection to the admission of the out-of-court statements (see State's Br. at 10-11), but the Illinois court most clearly addressed Mr. Dixon's federal Confrontation Clause claim and rejected it based on its reading of *People* v. *Owens*, 484 U.S. 554 (1988) (no Confrontation Clause violation where the witness claimed lack of memory about the out-of-court statement) and *People* v. *Flores*, 128 Ill. 2d 66, 88, 538 N.E.2d 481, 489 (1989) (interpreting *Owens* to hold that "a gap in the witness' recollection concerning the content of a prior statement does not necessarily preclude an opportunity for cross-

examination"). There can be no questioning this Court's jurisdiction to review this decision.[1]

II. THIS CASE SQUARELY PRESENTS AN IMPORTANT ISSUE THAT HAS BEEN THE SUBJECT OF A CONFLICT AMONG THE LOWER COURTS.

Aside from its ill-fated attempt at identifying an independent and adequate state ground for the decision below, the State has also resorted to the second tool of those who oppose petitions for certiorari: the State argues that no matter how unfair and unjust the result in this case, certiorari should be denied because the fact pattern of the case is somehow peculiar. The State points to this supposed "peculiarity" on dozens of occasions in the course of its brief, arguing that the facts of this case may prevent this Court from resolving the conflict among the lower courts and from pronouncing a sufficiently broad principle of law. See State's Br. at 6, 7, 8, 9, 11, 16, 19, 24, 25. The Court should not be misled by the State's attempt to marginalize the importance of this case or the extent to which it cleanly presents an important issue of constitutional law.

---

[1] In any event, even if the court had relied on an "independent" state law justification for rejecting Mr. Dixon's claim, that ground would not be "adequate" given the Illinois court's decision in *People* v. *Yarbrough*, 166 Ill. App. 3d 825, 831, 520 N.E.2d 1116, 1120 (5th Dist.) *appeal denied*, 121 Ill.2d 585, 526 N.E.2d 839 (1988), which held that a defendant need not call a witness for cross-examination in order to argue on appeal that the witness was unavailable. See generally *Ford* v. *Georgia*, 498 U.S. 411, 424 (1991) (in order to be considered "adequate" a state procedural rule must be "firmly established and regularly followed").

The sole support for the State's argument that Mr. Dixon's claim arises in a "peculiar" way is the State's contention that there was no pattern to Christopher Carlisle's assertion of his Fifth Amendment privilege. The State would have this Court believe that Carlisle randomly asserted the Fifth Amendment when the spirit moved him, and that the trial court generously indulged Carlisle by allowing him to arbitrarily decide what questions not to answer. If this were, in fact, the case, we would readily concede that the defense would have been duty bound to call Carlisle to the stand to see if he would opt to answer the vital questions about his out-of-court statement that the defense needed to pose. The fact is, though, that the State's description of Carlisle's testimony is patently inaccurate.

There was an obvious and definite pattern to when Carlisle sought to, and was allowed to, invoke his Fifth Amendment right. Carlisle answered *all* questions posed to him about every subject except for his May 12 out-of-court statement. To begin with, he answered *all* questions put to him about his relationship with the victim and the defendant. Tr. A56-58. The prosecutor then began to ask Carlisle about what he saw on the morning of May 12, when the victim was killed. Carlisle initially sought to invoke the Fifth Amendment to these questions, but when the trial court ordered Carlisle to answer the questions, Carlisle answered *all* questions put to him on this subject. Tr. A58-61. The only questions that Carlisle did not answer were those relating to the May 12 statement he had made to the State's Attorney. As for these questions, Carlisle refused to answer *each and every* question relating to the statement and the judge ruled that Carlisle

had the right to invoke his Fifth Amendment right with respect to *each and every* such question. Tr. A61-65.

The pattern of Carlisle's succe ul invocations of the Fifth Amendment was indisputable and made perfect sense. Carlisle testified at trial that he did not see who killed Patrick Marshall. Tr. A59. Forcing him to answer questions about the false statement that he had given to the authorities on May 12 would have been forcing him to incriminate himself, by admitting to have committed perjury when he gave that false statement. The trial court recognized this and consistently allowed Carlisle to refuse to answer *all* questions relating to the May 12 statement – the statement that would ultimately serve as the sole evidence relied upon by the trial court to convict Carl Dixon.

It is nonsense, then, for the State to suggest that it was unpredictable whether Carlisle would invoke his Fifth Amendment right if asked about his May 12 statement on cross-examination.[2] It plainly would have been futile for the defense to ask Carlisle questions about this statement, after he already refused to answer *all* questions put to him on that statement. Yet, this was the only

---

[2] Without any support in the record, the State makes the bizarre claim that "Carlisle did not really fear self-incrimination but was actually refusing to cooperate with the prosecution because he wanted to help petitioner get an acquittal. Therefore, the record shows that it is entirely possible that Carlisle would have answered whatever questions defense counsel might have put to him at trial." Brief in Opp. 16. The fallacy of this claim is apparent: had Carlisle been interested in helping the defendant he would have readily admitted on direct examination that he lied to the authorities when he made his May 12 statement.

subject about which the defense needed to cross-examine Carlisle. True, as the State claims, the defense could have cross-examined Carlisle about many subjects besides Carlisle's May 12 statement. But the defense had no need or desire to cross-examine Carlisle on those matters, none of which were damaging to the defendant. The only subject about which the defense needed to cross-examine Carlisle related to the May 12 statement, and this was the very subject about which Carlisle was unambiguously and successfully invoking his right against self-incrimination. See Pet. for Cert. 24 n.9.

This case, therefore, squarely presents the question that we asked this Court to decide in our Petition for Certiorari. This case presents, in a vivid manner, the question of "[w]hether a witness who repeatedly and successfully invokes his Fifth Amendment right and refuses to testify about an out-of-court statement when questioned by the prosecution on cross-examination is 'available' for cross-examination by the defendant, as required by the Confrontation Clause of the Sixth Amendment." Pet. for Cert. i. This case gives the Court the opportunity to settle the issue that has divided the lower courts[3] and to decide whether a witness is

---

[3] In our Petition for Certiorari we described many cases in which courts have divided on whether a witness can be unavailable for examination even in the absence of the witness's formal invocation of the Fifth Amendment upon questioning. The State's effort to dismiss the divergent results in these cases as "factbound" applications of a common rule is without merit. There is no common rule where one court states that "the confrontation clause does not require the futile act of calling [a witness] to the stand in open court to testify only to have him

"unavailable" when it is obvious that he will refuse to answer questions about the matter at issue, even if the defense foregoes the futile act of calling the witness to the stand to repeat his invocation of the Fifth Amendment.

Carl Dixon was convicted of murder, after a trial that cannot possibly be defended as fair. He was deprived of his right to attack the key piece of evidence against him – the very evidence that the trial court identified as the lone factor in the decision to find him guilty. Mr. Dixon urges this Court not to be misled by the State's efforts at minimizing the importance of this case.

---

refuse" (*United States* v. *Adams*, 759 F.2d 1099, 1107 (3d Cir. 1985)) and another court states that a witness cannot be deemed unavailable unless she states "firsthand and in the court's presence that she did intend to refuse to testify in reliance on her fifth amendment privilege" (*United States* v. *Pelton*, 578 F.2d 701, 709 (8th Cir. 1978)). Similarly, as we explained (Pet. for Cert. 14), the fact that some of the cases we have identified deal with the "unavailability" inquiry under the rules of evidence does not, in any sense, diminish the importance of the conflict among the court. Nor does it lessen the significance of the opportunity that this case presents for this Court to provide guidance on this recurring issue.

CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, petitioner respectfully request that this Court grant a writ of certiorari in this case, or, in the alternative, that the Court summarily reverse the judgment below.

Respectfully submitted,

LAWRENCE C. MARSHALL
Counsel of Record
357 East Chicago Ave.
Chicago, Illinois 60611
(312) 503-7412

JEFFREY URDANGEN
343 S. Dearborn St., Ste. 1510
Chicago, Illinois 60604
(312) 939-0330

October 11, 1994